Supreme Court, U.S.
FILED
081476 MAY 28 2009
OFFICE OF THE CLERK

No. 08-

IN THE

# Supreme Court of the United States

DWIGHT J. LOVING,

*Petitioner,*

*v.*

UNITED STATES DEPARTMENT OF DEFENSE AND
UNITED STATES DEPARTMENT OF THE ARMY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

*Of Counsel:*

TERESA L. NORRIS
BLUME WEYBLE & NORRIS, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

SETH A. WATKINS
*Counsel of Record*
CHARLES F. SCHILL
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

*Attorneys for Petitioner*

May 28, 2009

223081

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## CAPITAL CASE

## QUESTION PRESENTED

Whether death sentencing recommendations forwarded to the President in a military capital case may be withheld from disclosure to the subject servicemember under FOIA Exemption 5.

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[1] Pursuant to Sup. Ct. R. 14(1)(a), the notation "capital case" precedes the question presented because petitioner is under a sentence of death and the disposition of this FOIA case bears on petitioner's ability to review and respond to recommendations transmitted to the President concerning approval of his sentence.

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Dwight J. Loving ("Loving"), a military death-sentenced Army private whose case has been forwarded to the President for final review pursuant to the Uniform Code of Military Justice, respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Circuit in this case.

## OPINIONS BELOW

The December 23, 2008 opinion of the court of appeals is reported at 550 F.3d 32 (D.C. Cir. 2008). (App., *infra*, 1a-17a). The court of appeals denied a combined petition for panel rehearing and rehearing *en banc* by orders issued March 3, 2009. (App., *infra*, 37a-40a.) The July 26, 2007 opinion of the district court is reported at 496 F. Supp. 2d 101 (D.D.C. 2007). (App., *infra*, 18a-36a.)

## JURISDICTION

The district court's jurisdiction was invoked under 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(E)(iii) (2006); 5 U.S.C. §§ 552a(g)(1), 552a(g)(5) (2006); 28 U.S.C. §§ 1331, 1361 (2006); 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201-2202 (2006).

The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291 (2006). The judgment of the court of appeals was entered on December 23, 2008. (App., *infra*, 16a-17a.) A timely combined petition for panel rehearing and rehearing *en banc* was denied on March 3, 2009. (App., *infra*, 37a-40a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

## STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552 (2006), provides in relevant part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) (A) * * * each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (4) * * * * *
>
> (B) On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In

> such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(b) This section does not apply to matters that are —

* * * * *

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency * * * *.

Article 71 of the Uniform Code of Military Justice, 10 U.S.C. § 871 (2006), provides in relevant part:

> (a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended * * *.

## RULES FOR COURTS-MARTIAL INVOLVED

Rule for Courts-Martial 1204(c)(2), *as published in the Manual for Courts-Martial, United States* (2005), provides in relevant part:

> If the Court of Appeals for the Armed Forces has affirmed a sentence which must be approved by the President before it may be executed, the Judge Advocate General shall transmit the record of trial, the decision of the Court of Criminal Appeals, the decision of the Court of Appeals for the Armed Forces, and the recommendation of the Judge Advocate General to the Secretary concerned for the action of the President.

Rule for Courts-Martial 1207, *as published in the Manual for Courts-Martial, United States* (2005), provides:

> No part of a court-martial sentence extending to death may be executed until approved by the President.

## STATEMENT OF THE CASE

1. This case arises from two August 2005 requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a(d).[2] Petitioner, military death-sentenced Army private ("PVT") Dwight J. Loving whose sentence was affirmed by this Court on direct review well over a decade ago in *Loving v. United States*, 517 U.S. 748 (1996), filed separate requests with the Department of Defense's Directorate for Freedom of Information ("DoD") and the Department of the Army's Office of The Judge Advocate General ("Army TJAG"), seeking documents regarding military death penalty procedures in general and as specifically applied to him in connection with the President's statutory review of his sentence. The requests sought "[a]ny documents which set out or reflect current approved policies or procedures for forwarding cases involving death-sentenced military personnel from the service Judge Advocate General to the service Secretary to the President for final decision." (C.A. App. 71, 216.) The requests also sought documents "containing an opinion or recommendation about whether PVT Loving's death sentence should be approved or commuted." (C.A. App. 72, 217.)

Pursuant to Rule for Courts-Martial ("R.C.M.") 1204(c)(2), *as published in the Manual for Courts-Martial, United States* (2005) ("MCM"),[3] the principal source of such information with respect to first-party

[2] Loving's first-party Privacy Act request was also processed under FOIA pursuant to Army and DoD regulations. (C.A. App. 33-35, 117, 128.)

[3] The *Manual for Courts-Martial, United States*, R.C.M. 1204(c)(2) (2005) was in effect when, in January 2006, Loving's case was forwarded to the White House for Presidential review. (C.A. App. 113.)

FOIA requester Loving would be "the recommendation of the Judge Advocate General to the Secretary concerned," which, as will be discussed, was forwarded along with certain other documents, including court records, "for the action of the President." MCM, *supra*, R.C.M. 1204(c)(2). That sentencing recommendation is prepared in view of Article 71(a), Uniform Code of Military Justice ("UCMJ"), which requires that "[i]f the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President." 10 U.S.C. § 871(a); *see also* MCM, *supra*, R.C.M. 1207 ("No part of a court-martial sentence extending to death may be executed until approved by the President.").

Receipt of Loving's FOIA requests was acknowledged by DoD and Army TJAG, but otherwise the requests went unanswered. Upon learning that in January 2006 his case was forwarded to the White House for Presidential review (C.A. App. 330-331), Loving lodged administrative appeals with DoD and Army TJAG, again requesting response determinations to his FOIA requests. Army TJAG dug in its heels and revealed nothing. Instead, Colonel Flora D. Darpino, Chief, Criminal Law, Department of the Army, Office of the Judge Advocate General, adopted the position that "there is no requirement to give counsel or the accused any documents forwarded to the President in a capital case." (C.A. App. 263-264.) For its part, DoD eventually produced a batch of significantly redacted documents but withheld a cache of others without providing any index identifying the withheld material.

2. After waiting over a year for comprehensive responses to his FOIA requests, Loving filed the present action in September 2006, seeking injunctive relief in the

form of disclosure of the requested documents. (C.A. App. 7-18.) The district court entertained cross-motions for summary judgment. DoD and Army TJAG moved first, while simultaneously and finally identifying the withheld documents by producing indexes pursuant to *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). Ultimately, Loving narrowed the dispute to four documents (two each from DoD and Army TJAG) characterized by the government as relating to capital sentencing recommendations:

- withheld record #408 is "the TJAG's advice outlining the PVT Loving case in detail and providing a recommendation whether the SecArmy should recommend approval of the death penalty to the President" (C.A. App. 126, 193), the record being "[t]he final advice and recommendation" regarding "the approval or disapproval of PVT Loving's death sentence" (C.A. App. 123, 126);

- withheld record #499 is the "Secretary of the Army's one-page recommendation addressed to the President regarding whether to approve plaintiff Private Dwight Loving's death sentence" and was transmitted with record #408 (C.A. App. 126, 212, 300-301, 312-314); and

- withheld records #86 and #87 "relate to an actual recommendation regarding Loving's death sentence or the processing of such recommendation" (C.A. App. 295, 297), with record #86 being a memorandum for the

> President in which the Secretary of Defense "acted on Loving's case" for presidential review (C.A. App. 109, 113) and record #87 being a memorandum from the DoD General Counsel to the Counsel to the President (C.A. App. 109, 299-300).

The government asserted that each of the four withheld documents is exempt from disclosure under FOIA Exemption 5 based on the presidential communications privilege and the deliberative process privilege. In addition, the government asserted that record #408, a 31-page memorandum from the Army Judge Advocate General to the Secretary of the Army, is further exempt from disclosure under Exemption 5 as being attorney-client and work product privileged and subject to Army Regulation 340-21 ("The Army Privacy Program"). Finally, with respect to record #87, a 1-page memorandum from the DoD Office of General Counsel to the Counsel to the President, the government asserted exemption from disclosure under the work product doctrine.

The district court granted summary judgment to the government in July 2007 on the basis of executive privilege. (App., *infra*, 18a-36a.) The court first ruled that documents #408, #499, and #86 qualified for withholding under the Exemption 5 presidential communications privilege. Rejecting Loving's argument that none of these documents had been "solicited" by the President, the court held that "the President has solicited the advice of his military advisors through the Manual for Courts-Martial." (App., *infra*, 28a.) With respect to document #87, the court found the

government's declarations insufficient for application of the presidential communications privilege but nevertheless found the document properly withheld under the Exemption 5 deliberative process privilege. (App., *infra*, 29a.)

The district court rejected Loving's argument that the four withheld documents were analogous to a presentence investigation report ("PSR") that must be disclosed to an incarcerated first-party FOIA requester. (App., *infra*, 30a-32a.) The court also held that the presidential communications privilege is not "qualified" in the context of FOIA, thus rejecting Loving's arguments that this privilege could be overcome to permit disclosure. (App., *infra*, 28a.) Loving's position that the four withheld documents could not be privileged in view of his due process rights essentially was not addressed by the district court. (App., *infra*, 32a n.1.)

3. The court of appeals affirmed. Loving's argument that the four withheld documents contain the same kind of sentencing recommendations that would routinely or normally be available to him in order for the capital sentencing process to satisfy due process of law was rejected. (App., *infra*, 8a-10a.) The court refused to undertake a privilege analysis tailored specifically to Loving's status as a first-party requester seeking capital sentencing documents about himself. (*Ibid.*) Instead, the court held that executive privileges trumped, concluding that "the sole question we face is whether the requested documents would normally fall within the presidential communications privilege or the deliberative process privilege." (App., *infra*, 10a.) In its privilege analysis, the court reviewed the four withheld documents

"regardless of the requester's identity or particular need for the document." (App., *infra*, 10a, citation omitted.)

Siding with the government, the panel held that "the 'party protected by the privilege' is not Loving but rather the President of the United States." (App., *infra*, 10a (citation omitted).) The panel further opined that "Loving's identity as a capital prisoner subject to Article 71(a) proceedings therefore 'has no bearing on the merits' of his FOIA request, nor do any constitutional rights." (*Ibid.*, citation omitted.) With respect to whether the presidential communications privilege is presumptive or qualified such that the privilege may be overcome for example in view of the public interest in disclosure, the court provided a one-sentence analysis: "Because the presidential communications privilege 'is more difficult to surmount' than the deliberative process privilege, we conclude that it, too, is insurmountable here." (App., *infra*, 13a (citation omitted).)

4. Loving sought rehearing, arguing that capital sentencing recommendations are *per se* unprivileged, apart from the privacy interest held by the convicted servicemember. Again, Loving argued that the class of documents comprising capital sentencing recommendations are entitled to a constitutionally compelled, unprivileged status when privilege is measured against a requester's first-party identity. Loving also argued that even if the withheld documents are eligible to be withheld under the presidential

communication privilege, that privilege must fall in view of the most basic requirements of due process and the fair administration of criminal justice. Nevertheless, the petition for panel rehearing and rehearing *en banc* was denied.

## REASONS FOR GRANTING THE PETITION

### A. This Petition Raises Issues That Are Recurring and Important.

The decision below raises a recurring issue of exceptional importance in the context of the military death penalty and upsets this Court's settled law that rejects, as unconstitutional, the government's assertion of privilege to maintain capital sentencing recommendations in secret. In so holding, the court of appeals decided an important federal question concerning the applicability of FOIA Exemption 5 executive privileges—presidential communications privilege and deliberative process privilege—without due regard for this Court's controlling authority.

Until 2008, no military capital case had been approved by the President in nearly half a century, but now there is a growing cue of servicemembers subject to court-martial adjudged death sentences. Without this Court's intervention, an unchecked military will continue to evade the requirements of FOIA, and skirt death penalty precedent, developed during the decades of military death penalty inactivity. Now, only this Court can recognize a condemned servicemember's rights under FOIA to review capital sentencing recommendations forwarded for the President's consideration.

Before the Court is a narrowly tailored FOIA case in which the military is availing itself of executive privileges to deny a servicemember documents the government itself conceded are "sentencing recommendations" in connection with a first-party requester's capital case. This fact alone should raise at least two red flags: This Court held long ago that a defendant is "denied due process of law when the death sentence [is] imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Such is the guarantee of the Fifth Amendment to the Constitution. U.S. Const. amend. V. It follows from *Gardner* that because a capital sentencing recommendation must be disclosed to the subject, it cannot be privileged with respect to that subject. This Court also held long ago that no discovery privilege should be recognized with respect to sentencing recommendations, a.k.a. presentence investigation reports or PSRs, when requested by the subjects of those reports. *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988). Hence, *Julian* held that FOIA Exemption 5 is wholly inapplicable to the type of documents now being withheld by the government. *Ibid.*

Yet a third red flag must be raised in connection with the government's current withholding of military capital sentencing documents: During some timeframes in U.S. history, military sentencing recommendations forwarded to the President were intentionally and regularly *not* maintained under privilege.

In point of fact, the practice of The Judge Advocate General providing a detailed capital sentencing

recommendation to the service Secretary "for the action of the President," such as withheld document #408, is not a recent development.[4] But the secrecy now attached to that recommendation is inconsistent with prior practice. Courts-martial "case-law" reporters from the era of Presidents Roosevelt and Truman—a particularly active time for military executions—regularly *published*, for "the information of all concerned,"[5] the sentencing recommendation memoranda prepared by The Judge Advocate General proposing the President's action.[6]

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[4] *See, e.g.*, Article of War 50½, Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 797-99 (1920), *reprinted in A Manual for Courts-Martial* at 512-15 (1920).

[5] 1 C.M.R.(A.F.) ii (1949); 1 C.M.R. iii (1952).

[6] *See, e.g.*, The Judge Advocate General ("TJAG") Memo. to the Secretary of War ("SecWar") re: *James Rowe* (Aug. 21, 1942), *in* XIV Bd. Rev. 38 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Francis A. Line* (Dec. 19, 1942), *in* XV Bd. Rev. 266 (recommending that the President confirm the death sentence); Acting TJAG Memo. to SecWar re: *George S. Knapp* (1943), *in* XV Bd. Rev. 297 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Walter J. Bohn* (June 12, 1943), *in* XVIII Bd. Rev. 316 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Levi Brandon* (May 23, 1943), *in* XIX Bd. Rev. 210 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Harry R. Bever* (Apr. 26, 1944), *in* XXVIII Bd. Rev. 58 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *John J. O'Connor* (Sept. 2, 1944), *in* XXXVII Bd. Rev. 177 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Charlie B. Williams* (Sept. 1, 1944), *in* XXXVIII Bd. Rev. 179 (recommending that the President

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confirm the death sentence); TJAG Memo. to SecWar re: *Cornelius Thomas* (Dec. 26, 1944), *in* XLII Bd. Rev. 348 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Curn L. Jones* (Dec. 27, 1944), *in* XLIII Bd. Rev. 289-90 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Dan Boswell* (Dec. 26, 1944), *in* XLIV Bd. Rev. 16-47 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Lee R. Davis* (Dec. 26, 1944), *in* XLIV Bd. Rev. 270 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Clinton Stevenson* (Feb. 20, 1945), *in* XLV Bd. Rev. 287 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Herbert W. Reid* (Mar. 24, 1945), *in* XLVII Bd. Rev. 128 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Walter Beyer, Berthold Seidel, Hans Demme, Hans Schomer, and Willi Scholz* (Apr. 25, 1944), *in* L Bd. Rev. 49-51 (recommending that the President confirm the death sentences); TJAG Memo. to SecWar re: *Fred Hurse* (Sept. 29, 1944), *in* L Bd. Rev. 118-119 (recommending that the President confirm the death sentence); TJAG Memo. to SecWar re: *Erich Gauss and Rudolf Straub* (Oct. 2, 1944), *in* L Bd. Rev. 229-30 (recommending that the President confirm the death sentences); TJAG Memo. to SecWar re: *Edward J. Reichl* (June 3, 1945), *in* L Bd. Rev. 65 (recommending that the President confirm the death sentence); TJAG Memo. to Under SecWar re: *Garlon Mickles* (Oct. 29, 1946), *in* 64 Bd. Rev. 333 (recommending that the President confirm the death sentence); TJAG Memo. to the Secretary of the Army re: *Albert A. Morales* (June 24, 1949), *in* 1 Bd. Rev. & Jud. Coun. 212 (recommending that the President commute the death sentence); TJAG Memo. to the Secretary of the Air Force ("SecAF") re: *Robert E. Keller and James H. Burks* (Jan. 9, 1950), *in* 2 C.M.R.(A.F.) 549-52 (recommending that the President confirm the death sentence for Keller and commute the death sentence for Burks); TJAG Memo. to SecAF re: *Herman P. Dennis, Jr.* (Nov. 14, 1950), *in* 4
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The Judge Advocate General's memoranda also each forwarded a transmittal letter to be signed by the service Secretary in requesting the President's action, as well as a document for use by the President in ordering action on the sentence. *Id.*, note 6 *supra*. As a seemingly routine and normal matter, the practice of the Roosevelt and Truman administrations to publicly disclose (through publication) military capital sentencing recommendations forwarded to the President occurred at a time when FOIA had not even been enacted nor *Gardner* and *Julian* decided.

Such publication is no longer routine. The shroud of secrecy now attached to military capital sentencing recommendations, at least in part, appears literally to be a vestige of McCarthyism. As if issuing the drill command "about, FACE," President Eisenhower apparently abandoned the previous administrations' disclosure practices as a reaction to the ongoing Army-McCarthy Hearings, held by the United States Senate's Subcommittee on Investigations. The President instructed his Secretary of Defense that "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters" and "it is not in the public interest that

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C.M.R.(A.F.) 904-07 (recommending that the President confirm the death sentence); TJAG Memo. to SecAF re: *Robert W. Burns* (Nov. 14, 1950), *in* 4 C.M.R.(A.F.) 927-30 (recommending that the President confirm the death sentence); and TJAG Memo. to SecAF re: *Calvin Dennis* (Nov. 14, 1950), *in* 4 C.M.R.(A.F.) 953-56 (1950) (recommending that the President commute the death sentence).

any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed . . . ." Letter from Dwight David Eisenhower to Charles Erwin Wilson (May 17, 1954), *in* XV *The Papers of Dwight David Eisenhower* at 1075 (Louis Galambos & Daun van Ee eds., 1996); *see also* Letter from Dwight David Eisenhower to Charles Erwin Wilson (May 13, 1954), *in* XV *The Papers of Dwight David Eisenhower, supra,* at 1069-70. Fittingly, the Eisenhower administration is credited with having coined the term "executive privilege." Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability* 39 (2002).

The nondisclosure policy adopted by President Eisenhower has survived to date, although no President acted on a military death sentence from 1962 (when President Kennedy commuted a servicemember's sentence) until July 2008 (when President Bush approved servicemember Ronald Gray's sentence). *See, e.g., Bush approves execution of Army private* (July 28, 2008), CNN.com (search "execution of Army private").

The Court is thus called upon to act in a historic context—nearly half a century elapsed since the President was last required to review a military capital case. In the interim, FOIA was signed into law,[7] and this

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[7] Indeed, Congress appears to have raised concerns about McCarthy-style justice when it considered the FOIA legislation in 1966. For example, during final floor consideration of the legislation, Congressman David King stated:

> Access to the affairs of legislative bodies has become increasingly difficult thanks to another factor: the

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> business of legislatures is being conducted in . . . committees that may choose to call an executive session and subsequently close their doors to the public.
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> * * *
>
> . . . . Individual liberties, regardless of the lipservice paid them, become empty and meaningless sentiments if they are curtailed or suspended or ignored in the darkness of closed judicial proceedings. The dangers to man's freedoms that lurk in secret judicial deliberations . . . . were recognized . . . . by that generation of Americans that devised our scheme of government.
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> * * *
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> . . . . [C]ourt powers that were once exercised within the framework of due process guarantees are being transferred to quasi-judicial agencies, before which many of the due process guarantees have been cast by the wayside.
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> * * *
>
> To insure that no citizen will be denied full access to data that may be of crucial importance to his case . . . . [r]estrictions must be kept to a minimum and must be carefully circumscribed lest they grow and, in so doing, cause irreparable damage to liberties that are the American heritage and the American way of life.

112 Cong. Rec. 13644, 13645 (June 20, 1966).

The Senate also sought to use FOIA to defeat government secrecy affecting litigants, designing the Act to "prevent a

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Court's jurisprudence not only clarified the rights of capital offenders during sentencing but recognized distinct rights of first-party requesters under FOIA, particularly criminals in connection with sentencing. Moreover, while President Eisenhower's non-disclosure practice came into being during the infancy of the Uniform Code of Military Justice,[8] the body of interpretive military justice caselaw developed in the nearly sixty years since enactment of the UCMJ is quite substantial. In stark contrast, the military's non-disclosure policy with respect to capital sentencing recommendations to the President has remained essentially untested since it was put in place during the Eisenhower administration because the military's last execution occurred only months after President Eisenhower left office in January 1961.

Review by this Court is warranted to set right the flawed rationale of the lower courts that improperly justified withholding military capital sentencing recommendations from disclosure to Loving under FOIA Exemption 5. The court of appeals improperly interpreted the scope of FOIA Exemption 5, completely at odds with this Court's precedents and in a manner

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citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it." S. Rep. No. 89-813, at 7 (1965).

[8] The UCMJ was effective as of May 31, 1951. *See, e.g.*, Exec. Order No. 10214, *reprinted in Manual for Courts-Martial, United States*, 1951.

that gives new life to long-ago rejected bases for withholding sentencing recommendations. FOIA exemptions are supposed to be given a "'narrow compass'." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citations omitted); *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *FBI v. Abramson*, 456 U.S.. 615, 630 (1982); *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). The court of appeals, however, reduced this basic requirement merely into "a formula to be recited rather than a principle to be followed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 161 (1989) (Scalia, J., dissenting).

The implications of nondisclosure of capital sentencing recommendations, in effect, can be nothing short of miscarriage of justice.[9] Without recourse to FOIA, a servicemember under a court-martial adjudged death sentence must wait-out the Presidential review process and, if unfavorable, seek redress through habeas proceedings. In effect, a servicemember is forced to bide his time until the harm has occurred—his death sentence has been approved by the President. Only then can he complain that his due process rights were violated when the death sentence was imposed in view of sentencing recommendations conveyed to the President that he had no opportunity to deny or explain. Yet without some tangible proof that the

[9] Access to sentencing recommendations carries great significance particularly in modern times. Long gone are the days when a servicemember subject to a death sentence could personally appear at the White House to plead his case to the President. William C. Davis, *Lincoln's Men: How President Lincoln Became Father to an Army and a Nation* 174-75 (1999).

recommendations were factually or legally flawed, a habeas petition alleging denial of due process on this basis might face substantial hurdles to success.

Each and every servicemember who is subject to a death sentence at the discretion of the President faces the same dilemma if he cannot avail himself of the benefits of FOIA. That is, the government won't permit him to examine the capital sentencing recommendations forwarded to the President during the Article 71(a) review process, and even after the President has approved a death sentence, the servicemember, having not seen the recommendations, has no knowledge of their contents to support a habeas petition arguing fundamental denial of due process. It is with this backdrop that the present FOIA action has weighty undertones and repercussions, necessitating review by this Court.

### B. The Court Should Grant Certiorari to Determine Whether Its Precedents Establishing the Unprivileged Nature of Capital Sentencing Recommendations Are Applicable to a FOIA Exemption Analysis.

The court of appeals' simple but flawed reasoning for holding that the four withheld documents are privileged rests on a false premise—namely, that the government is the rightful holder of privilege over military capital sentencing recommendations. Without performing any analysis of the legitimacy of the government's privilege claim in view of the type of documents in question, the court of appeals conferred protection upon these documents under the presidential

communications privilege or the deliberative process privilege. (App., *infra*, 11a-15a.)

In order to affirm in favor of the government, the court sidestepped the elephant in the room by holding: "We need not decide whether *Gardner* gives Loving the right he claims, for Loving's constitutional rights as a capital prisoner affect the merits of his FOIA request only if *Julian* in fact applies to this case. It does not." (App., *infra*, 9a.) Had the court undertaken a privilege analysis in view of *Gardner*, however, the result would have been quite the opposite.[10]

This Court has left no doubt that in death penalty proceedings, a defendant is "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."[11] *Gardner*, 430 U.S. at 362.

[10] That capital sentencing recommendations were forwarded to the President does not change (and can't change) the fact that this class of documents enjoys a protected status under *Gardner* that *prohibits* secrecy. Such a constitutionally afforded status cannot be defeated by governmental privilege claims like FOIA Exemption 5's deliberative process privilege, presidential communications privilege, attorney-client privilege, or any other privilege.

[11] In a concurring opinion in *Gardner*, Justice White found the Eighth Amendment's ban on cruel and unusual punishments offended by any procedure for selecting defendants for the death penalty that permits consideration of a secret presentence report relevant to the defendant's character and record. 430 U.S. at 363-64 (White, J., opinion concurring in judgment).

*Gardner* involved the government's reliance on a "confidential" portion of a defendant's presentence investigation report that was considered by the sentencing judge but not provided to the defendant for review and comment. *Id.* at 353. After a Florida jury found the defendant guilty of first-degree murder, the jury returned an advisory verdict to the court recommending the imposition of a life sentence. *Id.* at 351-53. The proceeding was bifurcated, however, and the trial judge ordered a presentence investigation report prior to imposing the sentence. *Ibid.* When prepared, the report included a confidential portion that was not disclosed to the defendant. *Id.* at 353. Relying in part on that report, with its full content not being disclosed, the trial judge sentenced the defendant to death. *Ibid.*

Similar to *Gardner*, in Loving's case the government is attempting to submit sentencing recommendations to a sentencing authority in secret. And for the same reasons articulated in *Gardner*, furnishing "secret" and consequently "privileged" sentencing recommendations to the President in connection with his mandatory, statutory review of a military death sentence cannot be reconciled with the Due Process Clause of the Fifth Amendment. U.S. Const. amend. V.

By default, a capital sentencing recommendation must be unprivileged with respect to the subject of the document because of the fundamental constitutional protections intertwined with that document. *Id.* at 362 (it is a violation of due process to send a man to his death "on the basis of information which he had no opportunity to deny or explain"); *see also Simmons v. South Carolina*, 512 U.S. 154, 164-66 (1994) (petitioner was

denied due process when "prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death"); *Skipper v. South Carolina*, 476 U.S. 1, 9 (1986) (Powell, J., opinion concurring in judgment) ("petitioner's death sentence must be vacated . . . . because petitioner was not allowed to rebut evidence and argument used against him").

This Court has made clear that in "life and death" considerations, the benefits of disclosure far outweigh the risks "that some of the information accepted in confidence may be erroneous, or may be misinterpreted . . . ." *Gardner v. Florida*, 430 U.S. at 359. Indeed, the Court concluded that: full disclosure would promote the critical function of ascertaining the truth by essentially empowering the subject and his attorneys to review and comment on the sentencing recommendation to correct misinformation before it is too late; the risk of disruption of the process of rehabilitation has no merit in the event that a death sentence may be imposed; and the process of weighing the "relevance and significance of aggravating and mitigating facts" is served by promoting debate between adversaries rather than secrecy. *Id.* at 359-60. All of these observations have equal force in the Article 71(a) review process.

The contents of a sentencing report are not absolutely for "public consumption" if a subject's privacy interests are taken into consideration, but otherwise "the report is not privileged." *See, e.g., New Jersey v. Loftin*, 680 A.2d 677, 723 (N.J. 1996). Moreover, "[a] defendant may not obstruct a third party from obtaining the report through discovery when a legitimate trial need for discovery of its contents exists." *Ibid.* (citation omitted).

*Gardner*, taken alone, unambiguously demonstrates that in the context of capital sentencing, there can be no privilege to permit capital sentencing recommendations to be maintained in secret. FOIA exemptions thus are inapplicable.

### C. Presidential Approval of a Military Death Sentence Is Judicial in Character, Such That the Decision Below Squarely Conflicts With This Court's Holding in *Julian*.

DoD and Army have acknowledged that with respect to Loving's ultimate sentence, the President is "the final decision authority on this case." (C.A. App. 264.) The court of appeals failed to recognize the dual purpose of the four withheld documents in facilitating Presidential review under Article 71(a). Specifically, these documents inform the judgment of the President with respect to (1) his mandatory, statutory review and approval (or disapproval) of imposition of the death sentence,[12] and

[12] The requirement for "approval" necessarily suggests that "disapproval" is an option. In a declaration filed during the district court proceedings, Colonel Darpino of Army's Office of the Judge Advocate General admitted that withheld record #408 provides Army TJAG's "analysis and advice regarding the approval *or disapproval* of PVT Loving's death sentence." (C.A. App. 126 (emphasis added).) Colonel Darpino also described "the Secretary of the Army's one page memorandum setting out his recommendation regarding the approval or *disapproval* of Private Loving's death sentence." (*Id.* (emphasis added).) In the context of Article 71(a), while disapproval of a death sentence may be rare, as compared to approval optionally with commutation or remission in the nature of clemency, the President may confront circumstances uniquely necessitating

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(2) his consideration of executive clemency. When the President acts on a court-martial imposed sentence, this Court has explained that his action is "capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency." *United States v. Page*, 137 U.S. 673, 680-81 (1891), *explaining Runkle v. United States*, 122 U.S. 543, 557 (1887). Had the lower courts considered the nature of the four withheld documents—that they are sentencing recommendations made to the President—no privilege could have been recognized with respect to first-party FOIA requester Loving.

In *United States v. Fletcher*, this Court addressed the role of the President in the military justice system, holding that "action required of the President in respect of the proceedings and sentences of courts martial is judicial." 148 U.S. 84, 88-89 (1893); *see also Runkle*, 122 U.S. at 557 ("[T]he action required of the President is judicial in its character . . . . He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another."). This is a view to which Attorney

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such action. Furthermore, the text of Article 71(a) obliges this conclusion by first requiring that "[i]f the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until *approved* by the President" and then second requiring that "*[i]n such a case*, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit." (emphasis added). If disapproval is not an option, then the phrase "in such a case" would be superfluous.

General Bates previously had subscribed in his advice to President Lincoln concerning the "President's Approval of the Sentence of a Court Martial":

> Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are even placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence.

11 Op. Att'y Gen. 19, 21 (1864).

It follows that the process of Presidential review under Article 71(a) resembles a judicial sentencing proceeding because the President must make an ultimate sentence determination. The President's action is not optional, but instead compelled by the Uniform

Code of Military Justice.[13] Just as other judicial sentencing bodies have certain discretion in terms of pronouncing a sentence, so too does the President in electing whether to disapprove, or approve and optionally commute a military death sentence. Thus, among the "safeguards against the 'arbitrary or capricious' imposition of the death penalty . . . . the President, must also affirmatively find that the sentence is appropriate for imposition on the accused." *United States v. Matthews*, 16 M.J. 354, 378 & n. 12 (C.M.A. 1983).

In *U.S. Dep't of Justice v. Julian*, this Court resolved a split between the circuits in favor of first-party FOIA requesters seeking access to the sentencing recommendations prepared for and submitted to judges. 486 U.S. at 14. The disclosure required by *Julian* covers documents generated by the government for the "sentencing" phase of a proceeding. Essentially, the documents convey the opinions of the prosecution for consideration by the judge in arriving at a sentence. The military justice system is different in form, but similar in substance.

Under military law, the President serves as a sentence approval authority in a capital court-martial. The super-sentencing authority conferred on the President by Article 71(a), UCMJ effectively creates a multi-step sentencing process. A death sentence issued by a court-martial is subject to mandatory direct review,

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[13] Rules for Courts-Martial 1204(c)(2) and 1207 concerning the mandatory Presidential approval of any death sentence appropriately are included in Chapter XII of the *Manual for Courts-Martial* (2005) entitled "Appeals and Review."

which may extend to this Court (and did for Loving). Yet, even after direct review has been completed, it is the President's responsibility to order the ultimate sentence for the servicemember. Only the President, whose action is by statute a required part of the capital sentencing process, can finally approve a death sentence and ultimately condemn a servicemember. UCMJ art. 71(a).

Each of the four withheld documents in this case was prepared by the government—the prosecutors at DoD and Army TJAG—to facilitate the President's decision-making. It stands to reason, then, that the presentence investigation reports of civilian criminal justice and the military sentencing recommendations in the four withheld documents serve the same purpose of informing the judgment of a sentencing authority. Because *Julian* compels disclosure of the former, *Julian* necessarily requires disclosure of the latter.

### D. The Decision Below Conflicts With This Court's Precedents Concerning the Basic Rights of a First-Party FOIA Requester.

The court of appeals erred in failing to recognize Loving's first-party requester status under *Julian* and *Reporters Committee*, thereby denying him rightful access under FOIA to the four withheld capital sentencing documents. In *Julian*, the Court rejected the government's claims of Exemption 5 and 6 privileges to withhold copies of presentence investigation reports to first-party FOIA requesters, holding that "there simply is *no* privilege preventing disclosure . . . ." 486 U.S. at 14. Just like the presentence

investigation reports in *Julian*, the four withheld documents contested in this action present background concerning Loving's case as well as sentencing recommendations. This point was not disputed by the government and was acknowledged by the court of appeals. (App., *infra*, 8a.) Fundamentally, the Exemption 5 issue in the present case was crystallized in *Julian*:

> The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class.

486 U.S. at 14. For example, a document concerning an individual may be entitled to privacy privilege preventing general release to the public under FOIA, but would not be privileged with respect to the subject of the document as a first-party FOIA requester.[14]

However, there are distinctions between the fact pattern in *Julian* and Loving's circumstances. First, in

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[14] First-party requests under FOIA are not unusual. FOIA has become an important disclosure tool available to individuals seeking government information about themselves, such as: prisoner requests to the U.S. Parole Commission for copies of their presentence investigation reports; requests by individuals to the U.S. Equal Employment Opportunity Commission for materials in investigative "charge files"; requests by veterans to the U.S. Department of Veterans Affairs for their medical or benefits records; and requests by individuals for copies of records on them maintained by the Federal Bureau of Investigation.

*Julian*, the defendants claimed entitlement to their presentence investigation reports under Federal Rule of Criminal Procedure 32(c) and the Parole Act, 18 U.S.C. § 4208(c) (since repealed effective 2005), both of which require disclosure, at various times, to the defendant to whom the report applies. *Julian*, 486 U.S. at 7-8. Thus, a statute and a federal rule already mandated disclosure, and it was on this basis that the court of appeals limited the holding in *Julian* when permitting first-party requesters to gain access to the presentence investigation reports. (App., *infra*, 8a-10a.) The courts below inexplicably refused to recognize that a legal basis for finding capital sentencing recommendations to be unprivileged, and thus "routinely available" with respect to a first-party FOIA requester, may come from the Constitution itself rather than statute or rule of criminal procedure as in *Julian*. (App., *infra*, 9a.)

Second, *Julian* did not even involve a defendant facing a death sentence. Instead, in *Julian*, the subjects of the presentence investigation reports were Kenneth Julian, who was facing a ten-year sentence for weapons and drug violations, and Margaret Wallace, who was facing a three-year sentence for forging United States Treasury checks. Brief for the Petitioners at 10-11, *U.S. DOJ v. Julian*, 486 U.S. 1 (1988) (No. 86-1357), *available at* 1987 WL 881265. Thus it is no surprise that the Court did not focus on due process rights as vindicated in *Gardner*. The court of appeals ignored this second distinction altogether.

In denying Loving access to the four withheld documents, the court of appeals relied on *U.S. Dep't of*

*Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989) to clarify that "the requester's identity matters only where, as in *Julian*, 'the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege'." (App., *infra*, 9a-10a.) In this case, the court of appeals held that the "party protected by the privilege" with respect to the four withheld documents "is not Loving but rather the President of the United States" (App., *infra*, 10a).

But these precedents instruct that there are instances, albeit not involving garden-variety FOIA requests, for which "there is good reason to differentiate between a governmental claim of privilege . . . when a third party is making the request and such a claim when the request is made by the subject" of the document in question. *Julian*, 486 U.S. at 14; *see also Reporters Comm.*, 489 U.S. at 771 (the rights of particular *third-party* requesters are "no different from those that might be asserted by any other third party").

A FOIA analysis "turn[s] on the nature of the requested document," *Reporters Comm.*, 489 U.S. at 772, and capital sentencing recommendations are a class of documents for which openness, rather than secrecy, is constitutionally mandated. *See Gardner*, 430 U.S. at 362. The nondisclosure protections built into FOIA, whether Exemption 5 or any other exemption, are of no consequence. If the four withheld documents, as capital sentencing recommendations, are not entitled to any privilege except Loving's privacy interests, then the only party protected by privilege is Loving himself. In such a case, *Julian* and *Reporters Committee* still compel disclosure to this first-party requester.

### E. The Decision Below Conflicts With Supreme Court Precedent Requiring the Presidential Communications Privilege to Be Balanced Against the Public Interest in the Fair Administration of Criminal Justice.

This Court has never defined the metes and bounds of the presidential communications privilege in the context of FOIA. Instead, the court of appeals applied its own catch-all, bright-line rules under *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) and *In re Sealed Case*, 121 F.3d 729, 751-52 (D.C. Cir. 1997) to block disclosure of any documents that "directly involve" the President. (App., *infra*, 11a-13a.) Loving's argument that under FOIA the presidential communications privilege is still presumptive or qualified, and overcome in the extreme case at bar involving capital sentencing recommendations, was tersely rejected as being "insurmountable here" (App., *infra*, 13a). Loving contested whether the withheld documents are even memoranda or letters eligible for Exemption 5 protection. But under the D.C. Circuit's standards, even a document that was addressed to the Secretary of the Army (withheld document #408)—not the President—and thus underwent intermediate review before being attached to the Secretary of the Army's own sentencing recommendation written to the President (withheld document #499), was granted protection under the presidential communications privilege. Still further, under the D.C. Circuit's standards, whether these documents were ever "solicited" by the President was

of no consequence, only that the Office of the President had received them. (App., *infra*, 11a-13a.)[15]

When this Court last took up the issue of executive privilege in the *Nixon* cases, presidential communications were deemed to be only "presumptively privileged," not absolute. *See United States v. Nixon*, 418 U.S. 683, 706 (1974) (*Nixon I*); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 446 (1977) (*Nixon II*). And this Court made abundantly clear in *Nixon I* that the presidential privilege is illegitimate when not exercised in the service of the public interest: "[W]e must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." 418 U.S. at 711-12. Even in a situation having comparably less

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[15] Rule for Courts-Martial 1204(c)(2) then in effect at the time Loving's case was forwarded to the White House for Presidential review is silent, for example, about whether the Secretary of the Army or Secretary of Defense are to prepare sentencing recommendations for the President, and does not specify that the recommendation of "The Judge Advocate General to the Secretary concerned" is meant to be forwarded to the President. MCM, *supra*, R.C.M. 1204(c)(2). It has been reported, however, that the service secretaries' practice of forwarding a capital case to the Secretary of Defense, prior to the case being forwarded for the consideration of the President, was started in the Eisenhower administration. Dwight H. Sullivan, *Executive Branch Consideration of Military Death Sentences*, *in* Evolving Military Justice 137, 138 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

gravity than a death penalty decision, disclosure was ordered in *Nixon I*. *Id.* at 711-13. Yet without a hint of need for Presidential confidentiality on the basis of national security or foreign affairs,[16] the court of appeals has effectively held that the presidential communications privilege is absolute when asserted under FOIA Exemption 5.

Because of the unusual character of military death penalty proceedings, not to mention that "the irrevocable nature of the consequences is of decisive importance" in death penalty sentencing, *Baze v. Rees*, 128 S. Ct. 1520, 1551 (2008), the public interest strongly favors disclosure. Yet despite Loving's arguments, the court of appeals made no mention of public interest considerations, instead only echoing the district court's pronouncement that "the particular need of the [FOIA] applicant is not relevant." (App., *infra*, 13a.)

If ever there were to be a case in which a presumptive privilege should fall, disclosure of capital sentencing recommendations is the one. The interests in the fair administration of justice subsume numerous public interests, particularly considering the importance of disclosure rather than secrecy in the area of military death penalty sentencing that has otherwise remained

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[16] FOIA Exemption 1, 5 U.S.C. § 552(b)(1), provides a separate safeguard that permits the President to act in secret in the interest of the national defense or foreign policy, but the government has never contended that Loving's death sentence bears any relation either to national security or foreign affairs.

dormant for almost half a century.[17] (C.A. App. 116, 320-21.) The public interests strongly favor disclosure of the type of information contained in presentence investigation reports, prior to final sentencing in all death penalty proceedings and irrespective of the identity of the particular offender, so that the factual predicate and rationale underlying a sentencing recommendation may be reviewed, rebutted and, where necessary, corrected. (C.A. App. 325.)

### F. The Decision Below Conflicts With Basic Principles of FOIA Exemption 5 Concerning Factual Material in Deliberative Memoranda.

It is clear from the government's description of withheld document #408, a memorandum "outlining the PVT Loving case in detail" (C.A. App. 193), that substantial factual, non-deliberative matters are discussed. With respect to the remaining withheld documents, the government never provided sufficient descriptions to assess factual content. Pursuant to this Court's holding in *EPA v. Mink*, purely factual material

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[17] As the Court explained in *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 175 (2004), a case considering whether Exemption 7 could be overcome in light of public interest,

> "the balancing exercise in some [] case might require us to make a somewhat more precise determination regarding the significance of the public interest and the historical importance of the events in question. We might need to consider the nexus required between the requested documents and the purported public interest served by disclosure."

cannot be withheld under Exemption 5 if it "is severable without compromising the private remainder of the documents." 410 U.S. 73, 91 (1973).

The court of appeals erroneously ignored the government's admission with respect to the compiled factual content of document #408, declining to order release of the factual portions and refusing to find that the circumstances at least warrant *in camera* inspection of the withheld documents. (App., *infra*, 14a-15a.) "Plainly, in some situations, *in camera* inspection will be necessary and appropriate." *Mink*, 410 U.S. at 93. In view of the life or death decision that rests, in part, on the four withheld documents, any doubts should be resolved in favor of Loving. If Exemption 5 deliberative process privilege applies to any of the withheld documents, the government nevertheless should be ordered to release the factual sections of these documents.

## CONCLUSION

This Court recently held that "few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008). Likewise, this Court should exercise its jurisdiction and determine whether to sanction the Executive's asserted authority to deny a servicemember access under FOIA to capital sentencing recommendations prepared for the President's consideration. This issue is of exceptional importance because the President may rely on the content of such recommendations in deciding whether to order the subject's execution.

FOIA had not yet been enacted, nor *Gardner* and *Julian* decided, when the military last executed a servicemember. In this case, in which Exemption 5 privileges are being improperly asserted to prevent a servicemember from obtaining copies of capital sentencing recommendations sent to the President in the final stage of his military court-martial, the petition for a writ of certiorari should be granted.

Respectfully submitted,

*Of Counsel:*

TERESA L. NORRIS
BLUME WEYBLE & NORRIS, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

SETH A. WATKINS
*Counsel of Record*
CHARLES F. SCHILL
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

*Attorneys for Petitioner*

# APPENDIX

# APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED DECEMBER 23, 2008

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 7, 2008 Decided December 23, 2008

No. 07-5318

DWIGHT LOVING,
APPELLANT

v.

DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia
(No. 06cv01655)

Seth A. Watkins argued the cause for appellant. With him on the briefs was Charles F. Schill.

Michael S. Raab, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Jeffrey S. Bucholtz, Acting Assistant Attorney General, Jeffrey A. Taylor, U.S. Attorney, and Mark B. Stern, Attorney. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

*Appendix A*

Before: ROGERS and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Convicted of capital murder by a military court-martial, appellant filed suit under the Freedom of Information Act seeking disclosure of Department of Defense and Army memoranda prepared for the President in connection with his statutory review of appellant's death sentence. The district court found the requested documents exempt from disclosure under FOIA Exemption 5 and granted the government's motion for summary judgment. For the reasons set forth in this opinion, we affirm.

I.

Under Article 71(a) of the Uniform Code of Military Justice, the President must "approve[ ]" all court-martial death sentences before they are carried out. 10 U.S.C. § 871(a) ("If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President."). The Rules for Courts-Martial specify procedures for transmitting military death penalty cases to the President, requiring the Judge Advocate General to provide all court records and his or her recommendation to the Secretary of the Army "for the action of the President." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1204(c)(2) (2005 ed.), *available at* http:// www. loc. gov/rr/frd/ Military_Law/ pdf/ manual-2005.pdf.

*Appendix A*

A general court-martial sentenced appellant, Army Private Dwight Loving, to death after finding him guilty of felony murder, premeditated murder, attempted murder, and robbery. The United States Supreme Court affirmed the capital sentence. *See Loving v. United States*, 517 U.S. 748, 774 (1996). Proceeding under the Freedom of Information Act, 5 U.S.C. § 552, Loving asked the Department of Defense and the Army to disclose all records concerning the general procedures for transmitting military death penalty cases to the President, as well as all records concerning Loving's death sentence in particular. While these requests were pending, the Secretary of the Army forwarded Loving's case to the President for action under Article 71(a). Learning of the Secretary's action and having received no response to his FOIA requests, Loving initiated administrative appeals with both the Department of Defense and the Army. The Army never responded. The Defense Department did respond, releasing 133 pages and informing Loving that it was withholding an additional 104 pages under, among other things, FOIA Exemption 5, § 552(b)(5), which allows agencies to withhold documents protected by traditional discovery privileges, *see Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006). Loving then filed a second administrative appeal with the Department of Defense. When the Department failed to respond, Loving filed suit under FOIA, leading the two agencies to release hundreds of documents and withhold many others. The agencies also filed *Vaughn* indexes describing the withheld documents, *see Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C.Cir.1973), and moved

for summary judgment. Loving narrowed his request to ten documents and cross-moved for summary judgment to compel disclosure. After the two agencies identified six of these ten documents as "drafts," Loving narrowed his request to the four remaining documents. The disclosure of these four documents was the only matter disputed in the district court and is the only issue before us.

As described in the *Vaughn* indexes, two of the disputed documents reflect the sequential transmission of Loving's case—and recommendations on it—to the President from the Army Judge Advocate General and the Secretary of the Army. The first step in this sequence, Document 408, is a memorandum from the Army Judge Advocate General to the Secretary of the Army, offering "advice outlining the PVT Loving case in detail and providing a recommendation whether the [Secretary of the Army] should recommend approval of the death penalty to the President." Col. Flora D. Darpino Decl. Attach., Mar. 30, 2007. Document 499, in turn, is a one-page memorandum from the Army Secretary forwarding Document 408 to the President, *see* Darpino Decl. ¶ 33, and providing its own "recommendation regarding whether or not PVT Loving's death sentence should be approved," Darpino Decl. Attach. The third disputed record, Document 86, is a memorandum from the Defense Secretary to the President concerning "Military Court-Martial Capital Case Forwarded for Action, *United States v. Dwight J. Loving*." Robert E. Reed Decl. Ex. A, Mar. 27, 2007. Finally, Document 87 is a one-page memorandum from the Department of Defense Office of General Counsel to the White House Counsel concerning "The President's Action in Two Military Capital Cases." Reed Decl. Ex. A.

*Appendix A*

Finding Documents 408, 499, and 86 protected by the presidential communications privilege and Document 87 protected by the deliberative process privilege, the district court concluded that FOIA Exemption 5 shielded each of the disputed documents from disclosure. *See Loving v. Dep't of Def.*, 496 F. Supp. 2d 101, 107-09 (D.D.C. 2007). It therefore granted the government's motion for summary judgment and denied Loving's. *Id.* at 110.

Loving now appeals. We review the district court's summary judgment ruling de novo, remaining "mindful that the 'burden is on the agency' to show that requested material falls within a FOIA exemption," and affirming only if we detect no genuine issue of material fact. *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992) (quoting § 552(a)(4)(B)).

## II.

FOIA directs that "each agency, upon any request for records . . . shall make the records promptly available to any person" unless the requested records fall within one of the statute's nine exemptions. § 552(a)(3)(a). Exemption 5, the only exemption at issue here, allows the government to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b)(5). As we have explained, Exemption 5 "incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant"—including the

presidential communications privilege, the attorney-client privilege, the work product privilege, and the deliberative process privilege—and excludes these privileged documents from FOIA's reach. *Baker & Hostetler LLP*, 473 F.3d at 321. Because Exemption 5 covers "those documents, and only those documents, normally privileged in the civil discovery context," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), it does not protect documents that are " 'routinely' or 'normally' disclosed" in civil discovery, *Dep't of Justice v. Julian*, 486 U.S. 1, 12 (1988) (quoting *FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983)).

Exemption 5 incorporates two executive privileges that are relevant here: the presidential communications privilege and the deliberative process privilege. *See Baker & Hostetler LLP*, 473 F.3d at 321. The presidential communications privilege, a "presumptive privilege for [p]residential communications," *United States v. Nixon*, 418 U.S. 683, 708 (1974), preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially, *see Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). As such, the privilege protects "communications directly involving and documents actually viewed by the President," as well as documents "solicited and received" by the President or his "immediate White House advisers [with] . . . broad and significant responsibility for investigating and formulating the advice to be given the President." *Id.* at 1114. The privilege covers documents reflecting "presidential decisionmaking and deliberations,"

regardless of whether the documents are predecisional or not, and it covers the documents in their entirety. *In re Sealed Case*, 121 F.3d 729, 744-45 (D.C. Cir. 1997).

The deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks omitted). For the deliberative process privilege to apply, the material must be "predecisional" and "deliberative." *In re Sealed Case*, 121 F.3d at 737. Unlike the presidential communications privilege, the deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must. *Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993).

In support of his claim to the requested documents, Loving relies on *Department of Justice v. Julian*, 486 U.S. 1 (1988), in which the Supreme Court held that Exemption 5 does not protect presentence investigation reports from disclosure to prisoners who are the subjects of the reports. Insisting that the President's action under Article 71(a) represents the "ultimate sentencing" in a military capital case, Appellant's Opening Br. 11, Loving argues that the documents he seeks are akin to the presentence investigation reports at issue in *Julian*. If we accept Loving's premise, his rationale is simple enough: these documents, like the

presentence investigation reports at issue in *Julian*, contain sentencing recommendations. Indeed, although the government disputes Loving's characterization of the President's Article 71(a) authority, it denies neither the advisory nature of these documents nor the role they play in Article 71(a) actions.

But the analogy to *Julian* requires a second step. In *Julian* the Court relied on the fact that the government had previously shared the presentence investigation reports at issue with the requesters—two prisoners seeking access to their own reports—and that Federal Rule of Criminal Procedure 32(c), as well as the Parole Act, 18 U.S.C. § 4208(b) (1982), required as much. 486 U.S. at 11-14. Because of this, the Court concluded, the documents were "routinely available" to the prisoners, if not the public at large. *Julian*, 486 U.S. at 13 (internal quotation marks omitted). Thus, although the Court assumed that the documents would be privileged and exempt from disclosure if third parties were to request them, *see* 486 U.S. at 12-14, it concluded that there "simply [was] *no* privilege preventing disclosure" to the prisoners themselves. *Id.* at 13-14; *see also id.* at 13 ("Congress has strongly intimated, if it has not actually provided, that no such privilege should exist.").

Loving argues that the same is true here, though the law otherwise compelling disclosure, he contends, comes not from statute or rule of criminal procedure (as in *Julian*) but from the Constitution itself. Specifically, Loving relies on *Gardner v. Florida* for the

proposition that a defendant is "denied due process of law when the death sentence [i]s imposed . . . on the basis of information which [the defendant] ha[s] no opportunity to deny or explain." 430 U.S. 349, 362 (1977). Because the requested documents contain the precise kind of "capital sentencing recommendation[s]" that "would routinely or normally be available to [him] in order for the capital sentencing process to satisfy due process of law," Loving contends that the documents he requests are "routinely available" to him within the meaning of *Julian* and therefore subject to disclosure under FOIA. Appellant's Opening Br. 23.

We need not decide whether *Gardner* gives Loving the right he claims, for Loving's constitutional rights as a capital prisoner affect the merits of his FOIA request only if *Julian* in fact applies to this case. It does not. Although the Court suggested in *Julian* that FOIA sometimes compels the government to comply with one person's request for disclosure even though it could properly refuse an identical request from anyone else, the Court has since emphasized that FOIA rarely permits such distinctions. In *Department of Justice v. Reporters Committee for the Freedom of the Press,* the Court clarified that the requester's identity matters only where, as in *Julian,* "the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege." 489 U.S. 749, 771 (1989); *see also United Techs. Corp. v. FAA,* 102 F.3d 688, 692 (2d Cir.1996) ("*Julian* applies only where the Government's 'objection to disclosure is based on a claim of a privilege and the person requesting

disclosure is the party protected by the privilege . . . .' " (quoting *Reporters Comm.*, 489 U.S. at 771). Otherwise, "[t]he identity of the requesting party has no bearing on the merits" of a FOIA request at all. *Reporters Comm.*, 489 U.S. at 771.

Here the "party protected by the privilege," *id.*, is not Loving but rather the President of the United States. Loving's identity as a capital prisoner subject to Article 71(a) proceedings therefore "has no bearing on the merits" of his FOIA request, *id.*, nor do any constitutional rights that *Gardner* may afford him. Simply put, for the purposes of his FOIA request, Loving is no different than any other requester.

In sum, when executive privileges are at stake, *Julian* does nothing to alter standard Exemption 5 analysis, which asks only whether a document is "normally privileged," *FTC v. Grolier*, 462 U.S. at 28 (internal quotation marks omitted), regardless of the requester's identity or particular need for the document, *Sears, Roebuck & Co.*, 421 U.S. at 149 & n. 16. Thus, the sole question we face is whether the requested documents would normally fall within the presidential communications privilege or the deliberative process privilege. We turn to that inquiry now.

*Appendix A*

## III.

Having rejected Loving's primary argument, we can easily affirm the district court's ruling that Documents 408, 499, and 86 are exempt from disclosure based on the presidential communications privilege. Documents 499 and 86 are memoranda from the Army and Defense Secretaries directly to the President advising him on his Article 71(a) review of Loving's capital sentence. Such memoranda fall squarely within the presidential communications privilege because they "directly involve" the President, *Judicial Watch*, 365 F.3d at 1114, and their confidentiality "ensure[s] that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge," *In re Sealed Case*, 121 F.3d at 750.

Loving challenges the privilege's applicability to these two documents, quoting *Judicial Watch* for the proposition that "documents that are not 'solicited and received' by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege," 365 F.3d at 1112, and claiming that no evidence demonstrates that the President "solicited and received" these two memoranda. But this requirement applies only to "*internal* agency documents," that is, "agency documents that are not submitted for Presidential consideration." *Id.* (emphasis added). Nothing in *Judicial Watch* disturbs the established principle that communications "directly involving" the President, *id.* at 1114—like Documents 499 and 86—are entitled to the privilege, regardless of

whether the President solicited them. *See In re Sealed Case*, 121 F.3d at 751-52 (taking as indisputable that the presidential communications privilege includes "communications that directly involve the President").

Although not addressed directly to the President, Document 408 also falls within the presidential communications privilege. That document, which contains the Judge Advocate General's recommendation on Loving's capital sentence, was forwarded by the Army Secretary to the President. We agree with the district court that the President solicited and received Document 408 in a manner sufficient to bring it within the presidential communications privilege. Rule 1204(c)(2) of the Rules for Courts-Martial directs the Judge Advocate General to submit his recommendation so the President may act upon it, *see* MANUAL FOR COURTS-MARTIAL, R.C.M. 1204(c)(2) ("[T]he Judge Advocate General shall transmit . . . the recommendation of the Judge Advocate General to the Secretary concerned for the action of the President."), and it is the President who promulgates the Rules for Courts-Martial, *see Loving*, 517 U.S. at 770; 10 U.S.C. § 836(a). Furthermore, contrary to Loving's argument, Document 408 does not lose its privileged status simply because it traveled up the chain of command before the President received it. To be sure, *Judicial Watch* does suggest that documents subject to "various stages of intermediate review before . . . submi[ssion]" to the President might implicate the "confidentiality and candor concerns" animating the presidential communications privilege less so than direct

communications with the President. 365 F.3d at 1115. But it announced this principle with respect to "documents and recommendations . . . that are not submitted [to] the President"—rather than those, like Document 408, that ultimately are. *Id.* at 1117; *see also id.* ("[A]ny . . . documents, reports, or recommendations that the [agency] submits to the Office of the President . . . remain protected.").

Loving argues that even if Documents 408, 499, and 86 qualify for the presidential communications privilege, that privilege is " 'presumptive' and 'can be overcome by a sufficient showing of need.' " *Id.* Appellant's Opening Br. 26-27 (quoting *Judicial Watch*, 365 F.3d at 1113-14). The district court concluded, and the government now argues, that this principle is "inapplicable to FOIA, where the particular need of the applicant is not relevant." *Loving*, 496 F. Supp. 2d at 108. Although we have yet to address this question with respect to the presidential communications privilege, we have said with respect to the deliberative process privilege that "the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure." *In re Sealed Case*, 121 F.3d at 737 n. 5. Because the presidential communications privilege "is more difficult to surmount" than the deliberative process privilege, *id.* at 746, we conclude that it, too, is insurmountable here.

This brings us finally to Document 87—a one-page memorandum from the Department of Defense Office of General Counsel to the Counsel to the President,

which the district court found exempt from disclosure under the deliberative process privilege. Although not disputing that the document qualifies for the deliberative process privilege, Loving argues that the public interest in the document overcomes the privilege. He also argues that even if the privilege applies, the district court erred by failing to inspect the document to determine whether it contains segregable factual portions that may be disclosed.

*In re Sealed Case* forecloses the first argument for the reasons described above. 121 F.3d at 737 & n. 5. The second claim fails as well. Although Loving is correct that the government has the "burden of demonstrating that no reasonably segregable information exists within . . . documents withheld" under the deliberative process privilege, *Army Times*, 998 F.2d at 1068, district courts have "broad discretion" to decide whether *in camera* review is necessary to determine whether the government has met its burden, *Armstrong v. Executive Office of the President*, 97 F.3d 575, 577-78 (D.C. Cir. 1996). Here the district court relied on the very factors that we have previously deemed sufficient for this determination, i.e., the description of the document set forth in the *Vaughn* index and the agency's declaration that it released all segregable material. *See Johnson v. Executive Office for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002) ("The combination of the *Vaughn* index and the affidavits . . . are sufficient to fulfill the agency's obligation to show with 'reasonable specificity' why a document cannot be further segregated."). The district court thus acted well within

its discretion when, without inspecting the document itself, it ruled that the government had demonstrated that Document 87 contained no segregable portions.

## IV.

Because FOIA Exemption 5 covers the four documents Loving seeks, and because Loving sued under FOIA alone, we affirm.

*So ordered.*

*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 07-5318** **September Term, 2008**
FILED ON: DECEMBER 23, 2008

DWIGHT LOVING,

APPELLANT

v.

DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY,

APPELLEES.

Appeal from the United States District Court
for the District of Columbia
(No. 06cv01655)

Before: ROGERS and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

**JUDGMENT**

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby

affirmed, in accordance with the opinion of the court filed herein this date.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: December 23, 2008

Opinion for the court filed by Circuit Judge Tatel.

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DECIDED JULY 26, 2007

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Civil Action No. 06-1655 (ESH)**

**DWIGHT J. LOVING,**

**Plaintiff,**

**v.**

**UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,**

**Defendants.**

### MEMORANDUM OPINION

Plaintiff Dwight Loving seeks records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, from the Department of Defense ("DoD") and the Army concerning the President's pending review of plaintiff's military death sentence. This matter is before the Court on the parties' cross-motions for summary judgment. The issue is whether the defendants have properly invoked FOIA Exemption 5 to withhold four documents. As explained herein, the Court finds that the documents at issue were properly withheld.

Accordingly, the Court will grant defendants' motion for summary judgment and deny plaintiff's motion for summary judgment.

## BACKGROUND

In 1989 plaintiff, an Army private stationed at Fort Hood, Texas, was convicted of felony murder, premeditated murder, attempted murder and robbery under Article 118 of the Uniform Code of Military Justice ("UCMJ"). (Defs.' Statement of Material Facts as to Which There is No Genuine Issue ["Defs.' Statement"] ¶ 1). A general court-martial sentenced plaintiff to death. *United States v. Loving*, 517 U.S. 748, 751 (1996). A series of unsuccessful appeals and reviews followed. *See United States v. Loving*, 41 M.J. 213 (1994), *Loving*, 517 U.S. 748. However, the review of plaintiff's death sentence is not yet final, because it has not been approved by the President of the United States. 10 U.S.C. § 871(a) ("If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President"); *see also* Manual for Courts-Martial, Rule for Courts-Martial ("R.C.M.") 1207 ("No part of a court-martial sentence extending to death may be executed until approved by the President."). The procedure for transmitting a military capital case to the President is set forth in R.C.M. 1204(c)(2) and Army Regulation 190-55, which require the Judge Advocate General to transmit his or her recommendation along with court records and any clemency petition by the prisoner to the Secretary of the Army for action by the President. R.C.M. 1204(c)(2); Army Regulation 190-55.

*Appendix B*

The Acting Secretary of the Army prepared a memorandum for transmittal of plaintiff's case to the President in November 2004, but the case was then put on hold pending the outcome of plaintiff's appeals. (Defs.' Statement ¶ 9.) In August 2005, plaintiff submitted FOIA requests to the DoD and the Army seeking any documents regarding procedures for the forwarding of military death penalty cases to the President during the relevant times. (*See id.* ¶ 7.) Plaintiff also submitted Privacy Act requests for any documents containing opinions or recommendations regarding the approval or commutation of his death sentence and any other Army or DoD documents pertaining to his death sentence. (*See id.*)

In December 2005, the Court of Appeals for the Armed Forces denied plaintiff's two remaining petitions for extraordinary relief, but permitted him to file a habeas petition, which plaintiff did the following month. *Loving v. United States*, 62 M.J. 235 (2005). In January 2006, the Secretary of the Army delivered plaintiff's case to the White House for presidential action. (Defs.' Statement ¶ 12.) That same month, Loving filed administrative appeals with both the DoD and the Army complaining of the lack of response to his FOIA and Privacy Act requests. (*Id.* ¶ 13.) In early February 2006, the DoD provided 133 pages of responsive documents and informed plaintiff that 104 further pages were being withheld under FOIA Exemptions 5 and 6. (*Id.* ¶¶ 17, 21.) Plaintiff filed an administrative appeal in April 2006. (Pl.'s Statement of Material Facts Not in Dispute ["Pl.'s Statement"] ¶ 2.) On September 26, 2006, plaintiff filed

this action against the Army and DoD, seeking declaratory and injunctive relief for the release of responsive agency records. (Defs.' Statement ¶ 26.) Days after he filed this action, the Court of Appeals for the Armed Forces ruled in plaintiff's habeas case that his claim of ineffective assistance of counsel at trial was potentially meritorious and ordered an evidentiary hearing to establish the factual predicate for this claim. (Pl.'s Statement ¶ 1.)

After this case was filed, defendants released nearly 700 pages of responsive documents and withheld a similar number of documents under exemptions to FOIA and the Privacy Act. (Defs.' Statement ¶¶ 27, 30, 31, 35.) Defendants then moved for summary judgment, arguing that the documents not produced had been properly withheld. Plaintiff filed a cross-motion seeking release of ten of the withheld documents.

Ultimately, plaintiff narrowed his summary judgment motion to the following four documents which are identified by Vaughn Index number:

> #408 A 31-page memorandum from the Judge Advocate General of the Army to the Secretary of the Army (forwarded to the President pursuant to R.C.M. 1204(c)(2)) reflecting the Judge Advocate General's analysis of plaintiff's case and recommendation as to whether the Secretary should

recommend that the President approve plaintiff's death sentence, dated January 13, 2004;

#499 A one-page memorandum addressed from the Secretary of the Army to the President "containing the [Secretary's] recommendation regarding whether or not PVT Loving's death sentence should be approved," dated November 8, 2004;

#86 A one-page memorandum from the Secretary of Defense to the President forwarding plaintiff's military court-martial capital case to the President for action, dated January 8, 2006;

#87 An undated one-page memorandum from the DoD Office of the General Counsel to the Counsel to the President concerning "The President's Action in Two Military Capital Cases."

(Pl.'s Reply at 3.) Defendants contend these documents are exempt under FOIA Exemption 5 because they are subject to the deliberative process privilege, the presidential communications privilege, the attorney-client privilege and/or the attorney work product doctrine. (Defs.' Reply at 8-11.) Plaintiff disputes defendants' privilege claims and argues that the

documents are akin to presentence investigation reports ("PSRs"), which must be disclosed under FOIA. (Pl.'s Reply at 4, 7-10.)

## ANALYSIS

### I. Legal Standard

FOIA mandates that "each agency, upon any request for records . . . , shall make the records promptly available to any person" for "public inspection and copying," unless the records fall within one of the nine narrowly construed statutory exemptions. *See* 5 U.S.C. §§ 552(a)(2) & (a)(3)(A). FOIA is broadly conceived to permit access to official information as part of a "general philosophy of full agency disclosure." *EPA v. Mink*, 410 U.S. 73, 80 & n.6 (1973) (citation omitted); *see also Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989). An agency withholding information pursuant to a FOIA exemption bears the burden of justifying this decision, and challenges to an agency's decision to withhold documents are reviewed *de novo* by the district court. *See* 5 U.S.C. § 552(a)(4)(B); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987).

Summary judgment may be granted to the government in a FOIA case if "the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." *Greenberg v. U.S. Dep't of*

*Treasury*, 10 F. Supp. 2d 3, 11 (D.D.C. 1998) (citation omitted). Summary judgment may be awarded based solely on the information provided in declarations or affidavits when they explain "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (citations omitted). Summary judgment is inappropriate if the declarations are "conclusory, merely reciting statutory standards, or . . . too vague or sweeping." *King*, 830 F.2d at 219 (internal quotation marks and citation omitted).

## II. Exemption 5

FOIA Exemption 5, on which defendants rely to withhold the four documents at issue, permits the government to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 has been interpreted to incorporate, *inter alia*, the presidential communications privilege, the attorney-client privilege, the work product doctrine, and the deliberative process privilege. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006). Defendants have invoked some or all of these privileges as to the four documents at issue. The test under Exemption 5 is whether upon a showing of relevance, the documents

would "routinely" or "normally" be disclosed in a civil discovery context. *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 12 (1988). Because the Court finds that all four documents are protected by the presidential communications privilege or the deliberative process privilege, the Court need not address the remaining privileges invoked by the government.

The deliberative process privilege protects confidential intra-agency advisory opinions and materials reflecting deliberative or policy-making processes. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The purpose of the privilege is to protect the quality of agency decisions by allowing government officials the privacy to debate alternative approaches. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975). There are two requirements for the deliberative process privilege: the material must be both predecisional and deliberative. *In re Sealed Case*, 121 F.3d at 737. A document is predecisional if it is "generated before the adoption of an agency policy." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is deliberative if it "reflects the give-and-take of the consultative process." *Id.* at 866. The deliberative process privilege generally does not cover the purely factual portions of documents, except in cases where the factual material "is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737.

*Appendix B*

The presidential communications privilege is a "[p]resumptive privilege for Presidential communications . . . [that is] fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). The privilege can be invoked as to "documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential," and, if it is invoked, the documents become presumptively privileged. *In re Sealed Case*, 121 F.3d at 744. The privilege exists to ensure candor and objectivity with respect to the advice that the President receives from his advisors. *Nixon*, 418 U.S. at 708; *see also In re Sealed Case*, 121 F.3d at 743. Accordingly, it extends not only to communications directly involving and documents actually viewed by the President, but also it applies to communications authored or solicited and received by those immediate White House advisors with "broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Id.* at 752; *see also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004). Unlike the deliberative process privilege, the presidential communications privilege covers documents in their entirety. *In re Sealed Case*, 121 F.3d at 745.

Defendants claim that all of the documents are covered by the presidential communications privilege. As to three of those documents — #408, 499, and 86 —

the Court agrees. Two of the documents, a November 8, 2004 memorandum from the Secretary of the Army to the President setting forth the Secretary's recommendation as to whether plaintiff's death sentence should be approved (#499), and a January 8, 2006 memorandum from the Secretary of Defense to the President forwarding plaintiff's case to the President for action (#86), are communications to the President prepared to advise him regarding his decisionmaking with respect to plaintiff's death sentence. (Darpino Decl. ¶ 33 & Vaughn Index; Second Darpino Decl. ¶ 3 & Revised Vaughn Index; Reed Decl. ¶ 16 & Ex. A (Vaughn Index).)

Although the third document is a memorandum from the Army Judge Advocate General to the Secretary of the Army (#408), that memorandum, which reflects the Judge Advocate General's analysis and recommendation regarding plaintiff's death sentence, was appended to the Secretary of the Army's recommendation and forwarded on January 23, 2006, to the President along with that document and the memorandum from the Secretary of Defense. (Darpino Decl. ¶¶ 7, 33 & Vaughn Index; *see also* Defs.' Mem. at 5; Defs.' Reply at 10 n.8.) Moreover, the Judge Advocate General's memorandum was prepared pursuant to the Manual for Courts-Martial, in which the President has directed that in cases involving a sentence that must be approved by the President, the Judge Advocate General shall transmit his or her recommendation to the Secretary "for the action of the President." R.C.M. 1204(c)(2); *see also*

10 U.S.C. § 836 (procedures for cases triable in courts-martial are prescribed by the President); Darpino Decl. ¶ 32.

Plaintiff argues that although these documents may have been "received" by the President, it is unclear whether any of them was "solicited" by the President. (Pl.'s Reply at 7.) However, as noted, the President has solicited the advice of his military advisors through the Manual for Courts-Martial. *See* R.C.M. 1204(c)(2). Plaintiff also notes that it is "unclear" whether the President has personally invoked the presidential communications privilege with respect to the documents at issue (Pl.'s Reply at 8), but personal invocation is not required as to FOIA requests. *Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at *6 (D.D.C. Mar. 31, 2005). Finally, plaintiff suggests that even if the documents are presumptively privileged, he has made a showing of need sufficient to overcome the privilege. (Pl.'s Cross-Mot. at 14.) While the presidential communications privilege is qualified and can be overcome by a showing of sufficient need in the course of a criminal investigation, *see, e.g., Nixon*, 418 U.S. at 706-07, this principle is inapplicable to FOIA, where the particular need of the applicant is not relevant. *Engelking v. Drug Enforcement Admin.*, 119 F.3d 980, 980-81 (D.C. Cir. 1997); *see also In re Sealed Case*, 121 F.3d at 737 & n.5. The Court therefore finds that documents #408, 499, and 86 have been properly withheld under Exemption 5's presidential communications privilege.

The fourth document (#87) is an undated, one-page memorandum from the DoD Office of the General Counsel ("OGC") to the Counsel to the President regarding the President's action in two military capital cases (#87). (Reed Decl., Ex. A.) Although defendants also invoke the presidential communications privilege as to this document, it is unclear, based on the present record, whether that privilege applies. As noted, the presidential communications privilege extends to documents "solicited and received" by the President's immediate advisors, including his White House Counsel. *In re Sealed Case,* 121 F.3d at 752, 758. However, neither defendants' declarations nor the accompanying Vaughn Indices indicate whether the DoD OGC memorandum was created at the request of White House Counsel. *See id.* at 758 (White House must ordinarily show that communications received by presidential advisers that do not directly involve the President were solicited). The Court nevertheless finds that this document was properly withheld under the deliberative process privilege. According to defendants' declarations, the memorandum was prepared as part of a project initiated by the DoD OGC to create standardized review and staffing procedures for capital cases for all Military Departments. (Reed Decl. ¶¶ 2, 5-6.) No new procedures were ultimately adopted as a result of the initiative; hence, the memorandum is clearly predecisional. (*Id.* ¶ 2.) It is also deliberative in that it contains evaluations, opinions, and/or recommendations pertaining to the DoD OGC project. (*Id.* ¶ 6.) Accordingly, the Court finds that the DoD OGC memorandum (document #87) is protected by the deliberative process privilege.

Plaintiff also argues that disclosure of the four documents is mandated by *U.S. Department of Justice v. Julian*, 486 U.S. 1 (1988). That case is inapposite. *Julian* involved FOIA requests by individual inmates for copies of their PSRs. *Id.* at 6. The government argued that the reports were exempt from disclosure, citing, *inter alia*, Exemption 5. The Court rejected the government's argument, finding no privilege that prevented disclosure of a PSR when the requester is the subject of the report. *Id.* at 14.

Plaintiff argues that the four documents at issue here are "sentencing recommendations" that are analogous to and should be treated like a PSR. (Pl.'s Cross-Mot. at 11-13.) In holding that PSRs were not privileged, at least when requested by the subject of the report, the Supreme Court relied on Federal Rule of Criminal Procedure 32(c) and the Parole Act, 18 U.S.C. § 4205, both of which specifically require disclosure of a PSR to the defendant to whom it pertains at various stages of the criminal process. *Julian*, 486 U.S. at 4-5 (summarizing disclosure requirements). Noting the ability of Congress to "determine for itself which privileges the Government may avail itself of and which it may not" (at least to the extent that the privileges at issue are not constitutionally rooted), the Court found the privilege claims of the government untenable in light of these statutory disclosure provisions:

> [T]he thrust of the disclosure portions of Rule 32(c) and the Parole Act speaks so strongly

> against the existence of a privilege on the part of the Government when the request is from the subject of the report that we think it accurate to say that Congress has strongly intimated, if it has not actually provided, that no such privilege should exist.

*Id.* at 13.

Here, in contrast, there is no requirement of any sort that recommendations to the President regarding a court-martial death sentence be disclosed to the affected service member, and there is thus no basis upon which to conclude that the disclosure of such recommendations is "routine." *See id.* at 14. Although plaintiff does not dispute this, he argues that disclosure would be consistent with R.C.M. 1106(f), a post-trial procedural rule requiring the staff judge advocate's sentencing recommendation to be served on the accused and his counsel, who may then submit written corrections, rebuttal, or other comments on the recommendation. (Pl.'s Cross-Mot. at 12-13.) R.C.M. 1106(f), however, applies only to the staff judge advocate's recommendation to the convening authority regarding the action the convening authority should take on the sentence "in the exercise of command prerogative." R.C.M. 1106(a), (d)(1). The absence of a similar disclosure provision in R.C.M. 1204(c)(2) strongly

suggests that disclosure of the recommendation referenced therein is not required.[1]

## III. Segregability

Finally, plaintiff argues that defendants have not satisfied their burden to show that the withheld documents contain no "reasonably segregable" factual information. (Pl.'s Cross-Mot. at 15-16; Pl.'s Reply at 11-12.) The FOIA requires that "even if some materials from the requested record are exempt from disclosure, any 'reasonably segregable' information from those documents must be disclosed after redaction of the exempt information unless the exempt portions are 'inextricably intertwined with exempt portions.'" *Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (quoting 5 U.S.C. § 552(b) and *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). The agency must provide a "detailed justification" for its decision to withhold documents in their entirety as non-segregable. However, "the agency is not required to provide so much detail that the exempt material would be effectively disclosed." *Id.*

With respect to documents #408, 499, and 86, because the presidential communications privilege

1. Plaintiff also argues that the lack of a specific disclosure requirement is not dispositive since *Julian* simply follows the Supreme Court's protection of due process. (Pl.'s Reply at 8.) However, contrary to plaintiff's argument, nothing in *Julian* indicates that the decision was based on due process concerns.

"applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones," *In re Sealed Case*, 121 F.3d at 745, these documents are exempt in their entirety, and no further showing as to segregability is necessary. *See also id.* ("Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents.").[2]

In contrast to the presidential communications privilege, the deliberative process privilege does not apply to purely factual portions of documents that can be segregated from the opinions therein. *Mink*, 410 U.S. at 91. With respect to document #87, the one-page DoD OGC memorandum, defendants have provided plaintiff with a description of the document, as well as the Declaration of Robert E. Reed, the Associate Deputy General Counsel for Military Justice and Personnel Policy in the DoD OGC, who avers that DoD "released to plaintiff all material that could be reasonably segregated." (Reed Decl. ¶ 8.) Furthermore, defendants have voluntarily segregated and disclosed factual

2. Plaintiff asserts that the presidential communications privilege "does not protect 'purely factual material appearing in [requested] documents in a form that is severable without compromising the private remainder of the documents.'" (Pl.'s Reply at 11.) However, the case on which plaintiff relies for this proposition, *EPA v. Mink*, 410 U.S. 73 (1973), concerned the deliberative process privilege and did not address the presidential communications privilege. *See In re Sealed Case*, 121 F.3d at 739 n.8.

portions of hundreds of other documents in the present case. (*See* Defs.' Statement ¶¶ 27, 31.) The Court finds that the government's declaration and supporting material are sufficient to satisfy its burden to show with "reasonable specificity" why the document cannot be further segregated. *See Johnson*, 310 F.3d at 776.

## CONCLUSION

For the foregoing reasons, the Court will grant defendants' Motion for Summary Judgment and deny plaintiff's Motion for Summary Judgment.

*/s/*
ELLEN SEGAL HUVELLE
United States District Judge

Date: July 26, 2007

*Appendix B*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Civil Action No. 06-1655 (ESH)**

**DWIGHT J. LOVING,**

**Plaintiff,**

**v.**

**UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,**

**Defendants.**

**ORDER**

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that defendants' motion for summary judgment [Dkt. #7] is **GRANTED**; it is

**FURTHER ORDERED** that plaintiff's cross-motion for summary judgment [Dkt. #9] is **DENIED**; and it is

**FURTHER ORDERED** that this case is **DISMISSED WITH PREJUDICE.**

**SO ORDERED.**

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: July 26, 2007

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED MARCH 3, 2009

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 07-5318** **September Term 2008**
**06cv01655**

**Filed On:** March 3, 2009

Dwight Loving,

Appellant

v.

United States Department of Defense and Department of the Army,

Appellees

**BEFORE:** Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh,* Circuit Judges, and Williams, Senior Circuit Judge

---

* Circuit Judge Kavanaugh did not participate in this matter.

*Appendix C*

**ORDER**

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 3, 2009

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 07-5318** **September Term 2008**
**06cv01655**

**Filed On:** March 3, 2009

Dwight Loving,

Appellant

v.

United States Department of Defense and
Department of the Army,

Appellees

**BEFORE:** Rogers and Tatel, Circuit Judges, and Williams, Senior Circuit Judge

**ORDER**

Upon consideration of appellant's petition for panel rehearing filed on February 6, 2009, it is

**ORDERED** that the petition be denied.

*Appendix D*

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

(3)

Supreme Court, U.S.
FILED
AUG 31 2009
OFFICE OF THE CLERK

No. 08-1476

# In the Supreme Court of the United States

DWIGHT J. LOVING, PETITIONER

*v.*

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

(CAPITAL CASE)

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELENA KAGAN
*Solicitor General*
*Counsel of Record*
TONY WEST
*Assistant Attorney General*
MARK B. STERN
MICHAEL S. RAAB
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether documents of the Department of Defense and Department of the Army relating to the President's review of a military death sentence were properly withheld under Exemption 5 of the Freedom of Information Act.

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# In the Supreme Court of the United States

No. 08-1476

DWIGHT J. LOVING, PETITIONER

*v.*

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

(CAPITAL CASE)

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 550 F.3d 32. The opinion of the district court (Pet. App. 18a-36a) is reported at 496 F. Supp. 2d 101.

### JURISDICTION

The judgement of the court of appeals (Pet. App. 17a) was entered on December 23, 2008. A petition for rehearing was denied on March 3, 2009 (Pet. App. 37a-40a). The petition for a writ of certiorari was filed on May 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure of records held by federal agencies upon public request. Section 552(b), however, identifies several categories of records that are exempt from compelled disclosure. In particular, FOIA Exemption 5 authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5).

Exemption 5 protects from compelled disclosure "those documents, and only those documents, normally privileged in the civil discovery context," *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC* v. *Grolier Inc.*, 462 U.S. 19, 26 (1983). Documents that are "normally privileged" from discovery in a civil suit are exempt from disclosure irrespective of any demonstration of need made by a given requestor. See *Sears, Roebuck & Co.*, 421 U.S. at 149 n.16; *Grolier*, 462 U.S. at 28.

2. Petitioner was an Army private who was sentenced to death in 1989 by a general court-martial, a sentence that this Court affirmed on direct review. See *Loving* v. *United States*, 517 U.S. 748, 750 (1996).

Under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, if a court-martial issues a death sentence, "that part of the sentence providing for death may not be executed until approved by the President." 10 U.S.C. 871(a); see *Manual for Courts-Martial, United States* 2005, Rule for Courts-Marital 1207 (R.C.M.) ("No part of a court-martial sentence extend-

ing to death may be executed until approved by the President."). The President may also commute or remit the sentence. 10 U.S.C. 871(a).

Petitioner submitted FOIA and Privacy Act requests to the Department of Defense (DoD) and the Department of the Army seeking, among other documents, various memoranda prepared by senior officials and transmitted to the President in connection with the President's statutory review of petitioner's death sentence. Pet. App. 2a. The DoD released 133 pages in response to these requests but withheld an additional 104 pages on a variety of grounds, including FOIA Exemption 5. *Id.* at 3a.

3. Petitioner subsequently commenced this lawsuit against respondents under multiple statutes, including FOIA, and respondents released hundreds of additional documents and withheld many others. Pet. App. 3a. Petitioner ultimately narrowed his suit to a FOIA claim seeking disclosure of the following four documents at issue here (identified by *Vaughn* index number):[1]

> #408 A 31-page memorandum from the Judge Advocate General of the Army to the Secretary of the Army (forwarded to the President pursuant to R.C.M. 1204(c)(2)) reflecting the Judge Advocate General's analysis of plaintiff's case and recommendation as to whether the Secretary should recommend that the President approve plaintiff's death sentence, dated January 13, 2004;

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[1] See *Vaughn* v. *Rosen*, 484 F.2d 820, 826-828 (D.C. Cir. 1973) (requiring an "an itemized explanation by the Government" of documents withheld under a claimed FOIA exemption), cert. denied, 415 U.S. 977 (1974).

> #499 A one-page memorandum addressed from the [Acting] Secretary of the Army to the President "containing the [Acting Secretary's] recommendation regarding whether or not PVT Loving's death sentence should be approved," dated November 8, 2004;
>
> #86 A one-page memorandum from the Secretary of Defense to the President forwarding plaintiff's military court-martial capital case to the President for action, dated January 8, 2006;
>
> #87 An undated one-page memorandum from the DoD Office of the General Counsel to the Counsel to the President concerning "The President's Action in Two Military Capital Cases."

*Id.* at 21a-22a.

The government argued that the presidential communications and deliberative process privileges applied to the documents and therefore withheld them under Exemption 5. Pet. App. 5a.

The district court entered summary judgment in favor of respondents. See Pet. App. 18a-19a, 35a. The court held that three of the withheld documents, Documents 408, 499, and 86, were covered by the presidential communications privilege, see *id.* at 26a-27a, and that the fourth, Document 87, was covered by the deliberative process privilege, see *id.* at 29a.

4. The court of appeals affirmed. Pet. App. 1a-5a. The court rejected petitioner's claim that due process he contended he possessed as a capital litigant requesting documents in connection with his own death sentence rendered Exemption 5 inapplicable. *Id.* at 8a-10a. Relying on this Court's precedents, the court recognized that the identity of a FOIA requester matters only when "the objection to disclosure is based on a claim of privilege

and the person requesting disclosure is the party protected by the privilege." *Id.* at 9a (quoting *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (*Reporters Committee*)). Because the privileges at issue here belong not to the petitioner, but rather to the President of the United States and the Executive Branch, the court held that petitioner's identity and asserted need had no bearing upon the merits of his FOIA request. *Id.* at 10a. The court thus determined that the sole question was whether the presidential communications privilege and deliberative process privilege did, in fact, apply to the withheld documents. *Ibid.* Concluding that the privileges were applicable, the court held that the documents were properly withheld under Exemption 5. *Id.* at 11a-15a.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that Documents 408, 499, and 86 "are exempt from disclosure based on the presidential communications privilege." Pet. App. 11a.[2] Each of those documents was prepared for the President's direct review and therefore falls within the heart of the presidential communications privilege. See *id.* at 11a-13a. Petitioner contends that Document 408 is not protected by the presidential communications privilege because it "underwent intermedi-

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[2] As the court of appeals explained (Pet. App. 14a), petitioner does not dispute that the deliberative process privilege applies to Document 87.

ate review" before being transmitted to the President (Pet. 32), and similarly suggests that all three documents are unprivileged because they were not solicited by the President (Pet. 32-33). But this Court has never held that "intermediate review" defeats the presidential communications privilege or that the privilege rests on the President's "solicitation" of a document.[3] To the contrary, the Court has made clear that the privilege protects "communications in performance of [a President's] responsibilities" and "made in the process of shaping policies and making decisions." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (internal quotation marks omitted) (quoting *United States* v. *Nixon*, 418 U.S. 683, 708, 711 (1974)).

Petitioner contends (Pet. 36) that even if the privileges cover the disputed documents, the court of appeals should have ordered the disclosure of all segregable factual material, or, at the least, undertaken *in camera* inspection of the documents. But the presidential communications privilege protects even purely factual content in covered presidential communications. See *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (discuss-

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[3] The court of appeals has indicated that "internal agency documents" do not qualify for the presidential communications privilege unless "solicited and received" by the President or his "immediate White House advisers." *Judicial Watch, Inc.* v. *Department of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). As the court explained in this case, however, Documents 499 and 86 were addressed directly to the President and thus are not the kind of "internal agency documents" for which presidential solicitation would be required under that test. Pet. App. 11a. And Document 408 was "solicited and received" by the President by virtue of his promulgation of the *Manual for Courts-Martial*, which expressly requires the Judge Advocate General to "transmit . . . [a recommendation] to the Secretary concerned for the action of the President." *Id.* at 12a (citing R.C.M. 1204(c)(2)).

ing *United States* v. *Nixon*, *supra* ("Indeed, *Nixon* argued that the presidential privilege must be qualified to ensure full access to facts in judicial proceedings, thereby assuming that factual material comes under the privilege."). Accordingly, no factual segregation was required with respect to Documents 408, 499, and 86.

With respect to Document 87, both the court of appeals and the district court concluded that the government's description of the document, combined with its declaration that it had released all reasonably segregable material, sufficed to establish that "Document 87 contained no segregable portions." Pet. App. 15a; see *id.* at 33a-34a. Further review of that fact-bound ruling is not warranted.

2. Although the documents at issue satisfy the elements of privileges encompassed by Exemption 5, petitioner nonetheless contends that they cannot be withheld because the Due Process Clause compels their disclosure to a capital defendant. That contention reflects a fundamental misunderstanding of FOIA. Petitioner may seek judicial review of his constitutional claims through any available post-conviction proceeding ancillary to his criminal case. But FOIA does not furnish petitioner with a cause of action to litigate such claims. FOIA is a general disclosure statute that applies to all members of the public equally, and its language makes clear that its exceptions do not turn on the identity of the requestor. Rather, upon request, non-exempt records must be made "promptly available to *any person*." 5 U.S.C. 552(a)(3)(A) (emphasis added). See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004) ("[D]isclosure [under FOIA] does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.").

Consistent with FOIA's function as a disclosure statute serving the general public, this Court has held that Exemption 5 operates without regard to a litigant's stated "need [for the documents] in the context of the facts of his particular case." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975). Courts do not engage in a balancing or weighing of interests to determine whether particular documents are covered by a litigation privilege and therefore not subject to public disclosure under Exemption 5. As this Court has explained, that Exemption must be construed to encompass "those documents * * * *normally* privileged in the civil discovery context." *Id.* at 149 (emphasis added). The validity of an invocation of Exemption 5 thus turns on whether the requisite elements of a litigation privilege have been satisfied, not on any consideration of a plaintiff's countervailing need. See *FTC* v. *Grolier Inc.*, 462 U.S. 19, 27-28 (1983) ("Respondent urges that * * * the requested documents must be disclosed because the same documents were ordered disclosed during discovery in previous litigation. It does not follow, however, from an ordered disclosure based on a showing of need that such documents are *routinely available* to litigants.") (emphasis added). When, as here, the documents in question are "normally" privileged in the civil discovery context, that is the end of the inquiry. *Sears, Roebuck & Co.* 421 U.S. at 149 & n.16; *Grolier Inc.*, 462 U.S. at 28.

Petitioner's reliance on *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), is misplaced. *Julian* held that the subjects of privileged presentence investigative reports may obtain those documents under FOIA. Contrary to petitioner's suggestion, however, *Julian* did not create a general right for first-party requesters seeking "documents generated by the govern-

ment for the 'sentencing' phase of a proceeding." Pet. 27-28. Rather, as this Court explained in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), *Julian* turned on the fact that privilege at issue in that case could be "waive[d]" by the FOIA requester. *Id.* at 771. Thus, in explaining *Julian*'s reach, *Reporters Committee* concluded that "[e]xcept for cases in which the objection to disclosure is based on a claim of privilege *and the person requesting disclosure is the party protected by the privilege*, the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Ibid.* (emphasis added).

As the court of appeals explained (Pet. App. 9a-10a), that exception has no application here. Exemption 5 applies by virtue of established litigation privileges that protect the decision-making processes of the Executive Branch, including the President himself. Those privileges belong to the President and the Executive Branch, not petitioner, and petitioner has no right to "waive" the Executive Branch privileges at issue. See *Reporters Committee*, 489 U.S. at 771. Because the disputed documents in this case are covered by privilege, they would not be "routinely" available in civil discovery, *Sears, Roebuck & Co.*, 421 U.S. at 149 n.16, and are therefore protected by Exemption 5.

3. Having correctly concluded that a FOIA suit is not a proper vehicle through which to litigate petitioner's due process claim, the court of appeals did not address the merits of that constitutional claim, and there is no reason to depart from the Court's ordinary practice of declining to address such issues for the first time. See *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168-169 (2004).

In any event, petitioner's claim of a due process right to the requested documents lacks merit. Petitioner's judicial sentencing has already occurred, and he does not dispute that he was afforded full access to relevant documents concerning the judicial phase of his sentencing. The President's additional role in reviewing respondent's sentence—and the President's solicitation and receipt of advice from Executive Branch officials to facilitate that role—is wholly distinct from the adversarial adjudication at issue in *Gardner* v. *Florida*, 430 U.S. 349 (1977), and the related cases that petitioner invokes. Petitioner cites nineteenth century authorities for the proposition that the President's role in the court-martial process is, in some sense, "judicial." See Pet. 25-26. But the process of Presidential review is not akin to a judicial sentencing proceeding; rather, the President possesses wholly discretionary authority as to his decision-making process. Such Presidential review is "conducted after all legal reviews are completed," and is "conducted as a matter of clemency." *Loving* v. *United States*, 62 M.J. 235, 247 (C.A.A.F. 2005) (quoting S. Rep. No. 53, 98th Cong., 1st Sess. 24 (1983)). Accordingly, the President's exercise of authority under 10 U.S.C. 871(a) "is akin to a state governor's action, and as such, is not part of the direct judicial review of the case." *Loving*, 62 M.J. at 247; see *Loving* v. *United States*, 64 M.J. 132, 137 (C.A.A.F. 2006). Petitioner cites no authority to suggest that the President is constitutionally required to disclose any documents that inform his exercise of such discretion, let alone that the proper avenue for litigating such a constitutional challenge is an action under FOIA.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
*Solicitor General*
TONY WEST
*Assistant Attorney General*
MARK B. STERN
MICHAEL S. RAAB
*Attorneys*

AUGUST 2009

(4)

No. 08-1476

Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

DWIGHT J. LOVING,

*Petitioner,*

*v.*

UNITED STATES DEPARTMENT OF DEFENSE AND
UNITED STATES DEPARTMENT OF THE ARMY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF

*Of Counsel:*

TERESA L. NORRIS
BLUME WEYBLE & NORRIS, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

SETH A. WATKINS
*Counsel of Record*
CHARLES F. SCHILL
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

*Attorneys for Petitioner*

September 9, 2009

225107

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## ARGUMENT

It must be admitted that the question of compulsory disclosure *vel non* of capital sentencing recommendations to the subject of those recommendations was answered by this Court long ago in *Gardner v. Florida*, 430 U.S. 349 (1977). Respondents advance not a single line of reasoning to elucidate why the military justice system should be immune to the strict disclosure rule of *Gardner* as predicated on the Due Process Clause. Now comes Petitioner, a military death sentenced Army Private whose life hangs in the balance as the President, the ultimate sentencing authority in military capital cases, considers in secret four sentencing recommendations made by the prosecution. It is the withholding of these documents under 5 U.S.C. § 552(b)(5) (2006) that petitioner contests in this FOIA case.

Petitioner concurs with non-profit *amicus curiae* National Institute of Military Justice ("NIMJ") in urging that "there is a pressing need for this Court to clarify . . . the functioning of FOIA when court-martial capital prisoners seek access to their own presidential sentencing recommendations." (NIMJ Br. 6.) "The Court should grant certiorari to consider and clarify the applicability of executive privileges . . . where the President is required to make an adjudicatory decision about whether to approve of a death sentence." (*Id.* at 23.)

To be sure, this is not a run-of-the-mill FOIA dispute; the mere assertion of presidential privilege belies any specter of triviality. But it is obnoxious both to the plain words of Article 71(a) of the Uniform Code of Military

Justice ("UCMJ") and to this Court's death penalty jurisprudence to argue that just because the Commander-in-Chief hails from the Executive Branch, his role in capital courts-martial is anything short of a sentence approval authority. The inescapable conclusion that the President's statutory review of a military death sentence extends well beyond clemency leads to the inevitable corollary that capital sentencing recommendations forwarded to him by the prosecutors at the Department of Defense and the Army cannot be eligible for privilege.

By arguing that (1) merely because the Commander-in-Chief is the recipient of the four withheld documents, they must be privileged (Opp. Br. 9) and (2) Loving's "countervailing need" is irrelevant (Opp. Br. 8), the government dodges the point argued by Petitioner. Specifically, the nature of the documents, as capital sentencing recommendations, is such that they are simply ineligible to be sheltered from Loving under cover of privilege. As a first-party FOIA requester, having sought these documents specifically under this disclosure statute, Loving is the only holder of a cognizable privilege (privacy) over these documents.

Withheld by respondents under FOIA Exemption 5 executive privileges—presidential communications and deliberative process—the general character of the four documents in this case has been admitted on the record and thus is not at issue.[1] The government already

[1] Respondents incorrectly state that "petitioner does not dispute that the deliberative process privilege applies to Document 87." (Opp. Br. 5 n.2.) To the contrary, Loving has (Cont'd)

described withheld record #408 as "[t]he final advice and recommendation" from The Judge Advocate General of the Army, forwarded to the President, regarding "the approval or disapproval of PVT Loving's death sentence." (C.A. App. 123, 126.) Withheld record #499, similarly forwarded to the President, has been described as the Secretary of the Army's "recommendation . . . whether to approve plaintiff Private Dwight Loving's death sentence." (C.A. App. 126, 212, 300-301, 312-314.) Finally, the government has described withheld records #86 and #87 as relating to "an actual recommendation regarding Loving's death sentence." (C.A. App. 295, 297.) Indeed, as recognized by the court of appeals, the government "denies neither the advisory nature of these documents nor the role they play in Article 71(a) actions." (Pet. App. 8a.)

Concomitantly, the government does not dispute that the issue before the Court is readily capable of repetition, with a not insubstantial queue of servicemembers currently on death row. Nor does the government dispute that the very class of documents now being withheld was previously treated as *unprivileged* and that the military's capital sentencing recommendations sent to the President previously were even published "for the information of all concerned."[2]

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(Cont'd)

consistently maintained that no privilege applies to any of the disputed documents. Loving also has argued that if the presumptive deliberative process privilege applies to withheld record #87, the privilege is overcome due to the nature of this document.

[2] 1 C.M.R.(A.F.) ii (1949).

In their 5½ pages of "argument," respondents decline to address the implications of *Gardner* to the legitimacy of any governmental privilege claim over the four withheld records. By its silence, the government has failed to show why the question presented does not merit certiorari. Nor is the appropriateness of certiorari in this case diminished by the respondents' grumble that Loving relies on "nineteenth century authorities." (Opp. Br. 10.) The previous conclusions of this Court and an Attorney General, that in the military justice system Presidential approval of a sentence is judicial in character, have the same force of logic today as they did then.

Petitioner's arguments rest squarely on the shoulders of *Gardner*'s prohibition against secret capital sentencing recommendations and this Court's subsequent holding in *U.S. Dep't of Justice v. Julian* that "there simply is *no* privilege preventing disclosure" of sentencing reports to first-party FOIA requesters. 486 U.S. 1, 14 (1988).

### A. The Case at Bar Is a FOIA Action, Not a "Constitutional Challenge" Reserved for Loving's Criminal Case.

Respondents suggest that there is no need to assess whether the four withheld documents, as capital sentencing recommendations, are eligible subject matter to which any privilege may attach preventing disclosure to Loving. Portraying this FOIA action instead as a "constitutional challenge" (Opp. Br. 10) and arguing that "[p]etitioner may seek judicial review of his constitutional claims . . . [b]ut FOIA does not furnish

petitioner with a cause of action to litigate such claims" (Opp. Br. 5), the federal respondents strain credulity.

Petitioner has made abundantly clear that this dispute is about the government's disclosure obligations to a first-party requester under the FOIA statute. Yet, the federal respondents seek to re-spin the present dispute as an "[im]proper vehicle through which to litigate petitioner's due process claim." (Opp. Br. 9.)[3] It cannot seriously be argued that the most basic of constitutional rights recognized by the Court in *Gardner* are somehow inapplicable to a servicemember facing possible execution.[4]

The fundamental disagreement between the parties to this action is not whether Loving's due process rights have been violated. The President has not yet acted on Loving's case, so from that perspective, no harm has yet occurred as a result of the non-disclosure thereby necessitating *habeas* proceedings. Rather, at the heart of the question presented lies a basic disagreement

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[3] *See also* Opp. Br. 10 ("Petitioner cites no authority to suggest that the President is constitutionally required to disclose any documents that inform his exercise of such discretion, let alone that the proper avenue for litigating such a constitutional challenge is an action under FOIA.").

[4] "[W]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., with whom Souter, J., Ginsburg, J., and Breyer, J., joined, concurring).

about the nature of each of the four withheld documents. This Court has made clear that a FOIA exemption analysis "turn[s] on the nature of the requested document . . . ." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989).[5] Specifically, while the government contends that "the documents at issue satisfy the elements of privileges encompassed by Exemption 5" (Opp. Br. 7), Petitioner contends that the documents in question fit squarely within the constitutional rule, flowing from *Gardner*, that capital sentencing recommendations are *per se* unprivileged.[6] In other words, as a precondition to undertaking any element-by-element privilege analysis, a document must be of a nature susceptible to the privilege sought to be applied.

That President Eisenhower parted ways with his predecessors and decided to maintain military capital sentencing recommendations in secret (Petitioner's Br. 15-16) does not excuse this practice today. For we now know from this Court's 1977 holding in *Gardner* that

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[5] *See also FBI v. Abramson*, 456 U.S. 615, 626 (1982) ("[I]n determining whether information in a requested record should be released, the Act consistently focuses on the nature of the information and the effects of disclosure."); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989) (a FOIA analysis requires "consideration of the nature of each particular document").

[6] *See, e.g., State v. Bosworth*, 360 So. 2d 173, 175-77 (La. 1978) (identifying "important due process and fairness values" and citing *Gardner* when mandating disclosure of sentencing reports even in the face of a state statute otherwise requiring that such reports "shall be privileged and shall not be disclosed" to the subject).

capital sentencing recommendations simply cannot be maintained in secret in order for sentencing to pass muster under the Due Process Clause. Their disclosure is a matter *ex necessitate legis*. "Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). The practice of not disclosing military capital sentencing recommendations forwarded to the President has only survived due to the inactivity of the military death penalty over the last fifty years.[7] It cannot still be lawful under *Gardner*.

### B. The President's Responsibilities Under Article 71(a) Transcend Clemency Inasmuch as the President Serves as the Ultimate Capital Sentencing Authority.

Article 71(a) of the UCMJ is crystal clear when stating that "[i]f the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until ***approved*** by the President." 10 U.S.C. § 871(a) (2006) (emphasis added). Yet the government apparently finds ambiguity in these words (without specifying where), turning to the legislative history of the Military Justice Act of 1983 and providing an out-of context quote to allege that the

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[7] Half a century passed between 1957 when President Eisenhower approved execution of a military death sentence and the only other such approval to date, by President Bush in 2008. *See, e.g.*, Barbara Barrett, *Bush OKs Soldier's Execution*, The News & Observer, July 29, 2008.

President's Article 71(a) powers merely concern "clemency." (Opp. Br. 10.) This cannot be correct.

As a threshold matter, the government's resort to legislative history is improper because the words of Article 71(a) are plain. *See, e.g., Garcia v. United States*, 469 U.S. 70, 75 (1984). The statute means what it says—a servicemember's death sentence may only be carried out if the President expressly approves it, and the option to disapprove the sentence therefore remains available. Article 71(a) goes on to state that "[i]n such a case" in which the death sentence is approved "the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit." Thus, optionally, Presidential clemency can follow Presidential approval (e.g., the President can "commute" the death sentence to life in prison). The statute, on its face, does not support the government's conclusion that Presidential review under Article 71(a) is confined to clemency.

"[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia*, 469 U.S. at 75. When, as here, "the terms of a statute [are] unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Ibid.* (citations omitted); *see also Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history.").

Yet even if the words of the statute were unclear, nothing in the legislative history compels a reading of Article 71(a) that limits the President's role to one of clemency. The government relies on a Senate committee report concerning the Military Justice Act of 1983, which states:

> This legislation continues the present requirement that death sentences receive Presidential approval and that dismissal of an officer be approved by the Secretary of the Military Department concerned before such sentences are executed under Article 71. Such reviews are conducted after all legal reviews are completed, and do not involve a review of the legality of the proceedings; rather, they are conducted as a matter of clemency.

S. Rep. No. 98-53, at 24 (1983).

Taken alone, that quotation is misleading. Taken in combination with the immediately following text of the report, that quotation is given necessary context:

> In such cases, the remaining portion of the sentence may be executed when approved by the convening authority, but the President (in death cases) and the Secretary (in dismissal cases), as a matter of clemency, may remit any previously executed portion of the sentence.

* * *

> *Article 71(a)* is amended . . . . The term "remit" is used in this section in the sense of the power to pardon.

*Id.* at 24-25 (emphasis added).

As Article 71(a) provides, only "[i]n such a case" as the President first approves of the death sentence may he "commute, remit, or suspend the sentence." And the term "remit" is specifically implicated with respect to the President's pardon power. This is the optional clemency to which the legislative history refers.

The government separately attempts to shore up its flawed interpretation of the statute by analogizing the President's role to that of a state governor considering clemency. (Opp. Br. 10.) But, to reiterate, only "[i]n such a case" as the mandatory Presidential review has resulted in approval of the death sentence does the President turn to consideration of mercy. It is only after sentence "approval" has occurred that the President, like a governor, may then consider clemency. Otherwise, the President and a governor have powers over death sentences that bear no resemblance to one another. For example, in Texas (where Loving's crimes were committed) and Kansas (where Loving currently is incarcerated), execution of a death sentence does not require approval from the governor, and gubernatorial clemency requests are entirely optional. *See, e.g.*, 37 Tex. Admin. Code §§ 143.41-143.43; Kan. Stat. Ann. §§ 22-3701 – 22-3705.

While "the President possesses wholly discretionary authority as to his decision-making process" (Opp. Br.

10), he has authority to disapprove a sentence and thus not reach the issue of whether, in his discretion, clemency should be granted. Of similar importance is the undeniable truth that springs from Article 71(a): without Presidential action, a military execution cannot occur.

In sum, the President's role in the military justice system vis-à-vis the death penalty is multifaceted. "Pursuant to Article 71, the President acts as the final review, appeal and clemency authority for a soldier sentenced to death." Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, 2000 Army Law. 103, 104. The President's responsibilities first lie in determining whether to approve the death sentence. When the President acts in the military justice system, "if he approves of the proceedings of the court, his approval, like a judgment of a court of the last resort, is final and conclusive, and there can be no appeal from it." *Wooley v. United States*, 1857 U.S. Ct. Cl. LEXIS 148, at *5 (Ct. Cl. Dec. 15, 1857).

In defining military law and discipline, the will of Congress is entitled to "the highest deference." *Loving*, 517 U.S. at 768. It is Congress that established the Article 71(a) statutory duty requiring that a military death sentence must be "approved" by the Commander-in-Chief, and this act plainly is tantamount to pronouncing the ultimate sentence on a servicemember.[8]

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[8] Rule for Courts-Martial 1207 only requires that "[n]o part of a court-martial sentence extending to death may be executed until approved by the President." In contrast, Article 71(a) not only requires approval before execution of the death sentence but further permits the President to commute or remit the sentence.

It is for these reasons that the President has distinct and unmistakable death sentencing responsibility in the military justice system. To deny that the scope of the President's statutory review includes deciding whether to approve or disapprove a death sentence would be "to shut one's eyes to the realities of military law and custom." *Jackson v. Taylor*, 353 U.S. 569, 579 (1957). In Article 71(a), as with any other statutory provision of the UCMJ, "[i]t is not for us to question the judgment of the Congress in selecting the process it chose." *Id.* at 580.

### C. Petitioner Is Not "Waiving" Any Executive Branch Privilege Over the Four Withheld Documents Since No Privilege Can Rightfully Be Asserted.

It is a *non sequitur* to argue that the Exemption 5 executive privileges asserted by the government in this FOIA case are invulnerable to attack on the basis of the constitutional mandate recognized in *Gardner*. Yet the government argues that "[t]hose privileges belong to the President and the Executive Branch, not petitioner, and petitioner has no right to 'waive' the Executive Branch privileges at issue." (Opp. Br. 9.) Waiver presumes that a legitimate privilege may actually attach. But the four withheld documents, as already explained, are associated with a protected class and are *per se* unprivileged with respect to first-party requester Loving. Quite simply, he is the subject of those capital sentencing recommendations.

Petitioners argue that "[c]ourts do not engage in balancing or weighing of interests to determine whether particular documents are covered by a litigation privilege and therefore not subject to public disclosure under Exemption 5." (Opp. Br. 8.) This again misses the point. There is nothing to weigh if the only party protected by a cognizable privilege is the first-party FOIA requester.

## CONCLUSION

For the reasons given in Loving's petition and this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

*Of Counsel:*

TERESA L. NORRIS
BLUME WEYBLE & NORRIS, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

SETH A. WATKINS
*Counsel of Record*
CHARLES F. SCHILL
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

*Attorneys for Petitioner*

FILED
JUL 1 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-1476

IN THE
# Supreme Court of the United States

DWIGHT J. LOVING,
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UNITED STATES DEPARTMENT OF DEFENSE AND
UNITED STATES DEPARTMENT OF THE ARMY,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DANIEL S. FLOYD
*Counsel of Record*
BENJAMIN BRODERICK
SCOTT M. MALZAHN
MICHAEL M. LEE
ALEXANDER M. MIRCHEFF
ELIZABETH RICHARDSON-ROYER
PAUL FRICKE
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071-3197
(213) 229-7000

*Counsel for Amicus Curiae*

## QUESTIONS PRESENTED

Under Article 71(a) of the Uniform Code of Military Justice ("UCMJ"), the President must affirmatively approve any court-martial death sentence, and Petitioner sought production of the sentencing recommendations about his case through a Freedom of Information Act request.

1. Do persons sentenced to death under the UCMJ have a due process right to see sentencing recommendations that are made to the President before he or she approves the sentence?

2. Do the presidential communications and deliberative-process privileges apply to sentencing recommendations made to the President in capital cases under the UCMJ?

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## BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF *AMICUS CURIAE*[1]

The National Institute of Military Justice ("NIMJ") is a District of Columbia non-profit corporation dedicated to advancing the fair administration and public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and appeared before this Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

NIMJ is actively involved in public education through its website, www.nimj.org, and its numerous publications.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

More than thirty years after this Court held in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), that due process is offended "when a death sentence is imposed, at least in part, based on information which the defendant had no opportunity to deny or explain," army private Dwight J. Loving ("Petitioner") awaits the word of the President of the United States to learn whether his death sentence will be carried out based on sentencing reports that the government has refused to let him see. Four other service members on military death row have faced, or will face, the same plight unless this Court grants certiorari in this case and confirms that condemned service members have the same due process rights to access their sentencing reports as civilian defendants. The Court's decision in this case will also determine whether the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), will be permitted to serve its "core purpose" of letting citizens know how their government works. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

The decision of the United States Court of Appeals for the District of Columbia Circuit, which denied Petitioner access to sentencing recommendations in his own capital court-martial case, is based on an inaccurate application of this Court's past FOIA decisions and a fundamental misunderstanding of the President's role in the military death sentencing process. In *United States Department of Justice v. Julian*, 486 U.S. 1, 13 (1988), this Court held that FOIA's "Exemption 5," which exempts agency records from disclosure where

those records are routinely privileged in litigation, does not bar disclosure of presentencing reports to the subjects of those reports. The Court of Appeals failed to consider whether Petitioner, like other criminal defendants, has a right to see his sentencing reports such that the government's claimed FOIA exemptions become inapplicable under *Julian*. This Court should now grant review to consider that critical question.

This Court's death penalty jurisprudence establishes that the sentencing authority (ordinarily, a judge or a jury) must make an individualized determination as to whether to sentence a defendant to death, and that defendants have a right to know the information on which their death sentence is based. Under the Uniform Code of Military Justice ("UCMJ"), the President has a unique role in the sentencing process that requires him to render a personal judgment as to whether to approve of a death sentence and execute a service member. Unlike the President's constitutional power to pardon, which is wholly discretionary and exercised, if at all, only after a sentence is final, the President is affirmatively required by the statute to review the court record in capital courts-martial and decide whether to approve death sentences. The President's role as a sentencing authority in capital court-martial cases is judicial in nature – a distinction the Court of Appeals failed to appreciate. Basic due process principles require that the government not sentence a service member to death based on secret information given to the President while he is acting in a quasi-judicial capacity.

Additionally, the presidential communications privilege and the deliberative-process privilege,

which are designed to protect executive branch decision-making, do not apply when the President is serving in a quasi-judicial role. The fair administration of military justice is disserved by a rule that would sentence service members to death based on information that is not disclosed to the defendant. Moreover, such secrecy does not further any legitimate executive concerns in this case. At least in the absence of a specific claim that disclosure of Petitioner's sentencing recommendations would harm national security or cause harm to third parties, those recommendations should be disclosed to the subject service member in the interests of fair administration of military justice. In other words, the mere assertion that sentencing recommendations are protected from disclosure by executive privileges is insufficient to uphold the government's burden of showing under FOIA Exemption 5 that such recommendations are not routinely available to defendants in litigation. Accordingly, this Court should grant certiorari to consider the narrow, but important, issue presented as to whether due process requires disclosure of sentencing recommendations to the service member or defense counsel before the President approves a court-martial death sentence.[2]

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[2] Aside from disclosure of sentencing recommendations to the defendant or defense counsel, this case does not concern, and NIMJ does not presently take any position with respect to, whether service members are entitled to any additional due process protections in connection with presidential approval of court-martial death sentences.

## STATEMENT

Since the adoption of the UCMJ in 1950, the military has executed ten service members under the UCMJ's provisions. Cynthia Swarthout Conners, *The Death Penalty in Military Courts: Constitutionally Imposed?*, 30 UCLA L. Rev. 366, 369 (1982). The last time such an execution took place was April 13, 1961, when John A. Bennett—whose Army death sentence was approved by President Eisenhower and carried out during President Kennedy's administration—was hanged for rape and attempted murder. Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L. Rev. 1, 1-3 (1994). At present, there are a total of five service members (including Petitioner) under military death sentences.[3] Criminal Justice Project, NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.* 67 (Winter 2009), available at http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2009.pdf ("*Death Row U.S.A.*") (identifying five service members under military death sentences). Of these five, the President already has approved the execution of Private Ronald A. Gray and is currently considering Petitioner's death sentence. *Bush OKs Execution for*

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[3] In addition to the five service members under military death sentences, there are four other service members who have been convicted of capital crimes, but are presently awaiting a retrial or are in the direct appeal process. *Death Row U.S.A.*, *supra*, at 67.

*Army Death Row Inmate*, MSNBC.com, July 29, 2008, http://www.msnbc.msn.com/id/25891431.[4]

The important constitutional issues in this case are likely to recur as other service members on death row attempt to use FOIA to obtain access to sentencing recommendations received by the President in their cases. The Court of Appeals' published decision in this case has the effect of creating a new rule that would categorically deny all service members on death row access to sentencing recommendations given to the President in capital court-martial cases. Accordingly, there is a pressing need for this Court to clarify now both the due process rights possessed by military service members on death row and the functioning of FOIA when court-martial capital prisoners seek access to their own presidential sentencing recommendations.

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[4] Mr. Gray's execution currently is stayed pending a habeas petition in the U.S. District Court for the District of Kansas. *See Execution Stayed for Ex-Soldier in Murder Case*, MSNBC.com, Dec. 2, 2008, http://www.msnbc.msn.com/id/28019409/wid/18298287.

## ARGUMENT

### I. REVIEW IS NEEDED TO CLARIFY THAT FOIA EXEMPTION 5 IS INAPPLICABLE BECAUSE SERVICE MEMBERS HAVE A RIGHT TO KNOW THE INFORMATION ON WHICH THEIR DEATH SENTENCE IS BASED.

#### A. *Julian* controls because Petitioner is the subject of the requested documents.

By enacting FOIA, Congress created a "broad right of access to official information." *Reporters Comm.*, 489 U.S. at 772 (citing *EPA v. Mink*, 410 U.S. 73, 80 (1973)). FOIA's basic policy requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Id.* at 773 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)). This policy, in turn, focuses on "the citizen's right to be informed about 'what their government is up to.'" *Id.* The citizen's need to "be informed about what their government is up to" is never more acute than when a government official – here, the President of the United States – is entrusted with the discretionary determination of whether to end the life of that American citizen.

In *Julian*, this Court held that a criminal defendant is entitled under FOIA to obtain copies of his or her own presentencing reports. 486 U.S. at 14. The Court reasoned that, while statutory privileges may prevent disclosure of these reports to third party FOIA requesters, these privileges do not apply to requesters who are the subjects of the reports they seek. *Id.* at 12-14. A few months after *Julian*, in *Reporters Committee*, this Court ruled that, pursuant to Exemption 7 dealing with privacy concerns, *third parties* could not use FOIA to obtain access to

criminal history reports or "rap sheets." 489 U.S. at 780. It also emphasized that "Congress clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest in a particular document." *Id.* at 771 (internal citations omitted).

Since *Reporters Committee*, lower courts have continued to recognize the principle articulated in *Julian* that "a person who requests records pertaining to himself has rights that will sometimes—albeit rarely—differ from those of other, third party requestors." *Sinito v. U.S. Dep't of Justice*, 176 F.3d 512, 516-17 (D.C. Cir. 1999). On the other hand, lower courts generally have refused to extend language in *Julian* that suggests the identity of the requester may be relevant to a FOIA request, to contexts where the FOIA requester is not the subject of the report. *See, e.g., United Techs. Corp. v. FAA*, 102 F.3d 688, 691-92 (2d Cir. 1996) (third party FOIA requester seeking confidential documents is not entitled to requested documents, even though it claimed that it already had knowledge of the confidential information in the documents).

Rather than harmonize this Court's FOIA precedents, the Court of Appeals relied exclusively on *Reporters Committee* and refused to apply *Julian*. *See Loving v. Dep't of Def.*, 550 F.3d 32, 39 (D.C. Cir. 2008) ("*Loving III*"). *Julian* is nearly directly on point. Similar to Petitioner's FOIA requests, which seek access to sentencing recommendations about Petitioner's own capital case, the requesters in *Julian* sought access to presentencing reports about their own cases. 486 U.S. at 3. *Reporters Committee*, an Exemption 7 privacy case concerning third-party requesters, should neither control this case nor the

cases of similarly situated service members who seek access to sentencing recommendations about their own capital cases.

### B. The Court of Appeals failed to consider Petitioner's due process rights in the context of a military death penalty case.

The Court of Appeals failed to consider whether Petitioner has a due process interest to copies of the sentencing recommendations transmitted to the President under Article 71(a) of the UCMJ. *See Loving III*, 550 F.3d at 39 (stating that "[w]e need not decide whether *Gardner* gives Loving the [due process] right he claims"). The primary duty of this Court is to pass judgment on constitutional issues, *see, e.g.*, *Commonwealth of Mass. v. Laird*, 400 U.S. 886, 894 (1970), and it should take this opportunity to do so. Certiorari should be granted to confirm that disclosure of these sentencing recommendations is constitutionally required under the Court's settled death penalty jurisprudence, such that the asserted privileges do not bar disclosure of these recommendations to Petitioner and FOIA Exemption 5 is inapplicable.

#### 1) The Court's death penalty jurisprudence recognizes that capital defendants have a right to access the sentencing procedures that determine life or death.

The Court has not yet considered the impact of its modern death penalty jurisprudence on the President's unique duty to render judgment as to the appropriateness of a court-martial death sentence before that sentence is made final. However, the Court has "recognized that death is a different kind of punishment from any other" and the "sentencing process, as well the trial itself, must satisfy the

requirements of the Due Process Clause." *Gardner*, 430 U.S. at 358. The Court should grant certiorari to affirm that its settled death penalty jurisprudence applies throughout the capital court-martial process.

The Court has consistently held that the sentencing authority in a capital case must make an individualized determination as to whether to impose the death penalty and it may not be precluded from considering as a mitigating factor any aspect of the defendant's character or record that would lessen the severity of the punishment. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense"). Further, military courts have regularly applied the Court's death penalty jurisprudence to courts-martial. *See United States v. Matthews*, 16 M.J. 354, 369-70 (C.M.A. 1983) (relying on *Furman v. Georgia*, 408 U.S. 238 (1972), to invalidate the then-existing military death penalty system); *United States v. Thomas*, 46 M.J. 311, 315 (C.A.A.F. 1997) (relying on *Mills v. Maryland*, 486 U.S. 37, 383-84 (1988), for the rule that heightened procedural reliability is necessary in capital cases).

But the constitutional promise that a death sentence must be based on consideration of all the available information about the defendant is an empty one if he or she does not have access to the recommendations upon which presidential approval

rests. *Gardner* is particularly relevant. There, the trial judge sentenced the defendant to death based in part on a presentence investigation report, portions of which were confidential and not disclosed to defendant. 430 U.S. at 351-53. The Court held that the trial judge's use of a confidential presentence report violated Gardner's due process rights, *id.* at 362, reasoning that "giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases" is an important component of the criminal justice system's "truth-seeking function." *Id.* at 360; *see also United States v. Davenport*, 151 F.3d 1325, 1328 (11th Cir. 1998) (noting that the purpose of timely disclosure of presentencing information to the defendant "is to ensure accuracy and fairness in sentencing by allowing the defendant adequate time to review and verify the information"); *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995) (noting that presentence investigation reports "do not conform to the rules of evidence and may contain errors" and that a defendant must therefore be given the "opportunity to object to errors"). Sentencing based upon truthful and accurate information is particularly critical in the context of capital cases. As this Court explained:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Woodson*, 428 U.S. at 305.

2) The procedure for presidential approval must comply with due process because presidential approval is an essential element of imposing a death sentence under the UCMJ.

Members of the armed forces who are tried and convicted by court-martial are entitled to due process of law under the Fifth Amendment. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).[5] What process is due "depends upon an analysis of the interests of the individual and those of the [military] regime to which he is subject," and a court reviewing legislatively approved military procedure "must give particular deference to the determination[s] of Congress." *Id.* (citation omitted); *see also Weiss v. United States*, 510 U.S. 163, 164 (1994). The due process rights guaranteed to a service member under the UCMJ and its implementing regulations may be greater than or less than the due process rights guaranteed in the civilian context under the Fifth Amendment, *United States v. Eshalomi*, 23 M.J. 12, 24-25 (C.M.A. 1986), but if less, then the burden rests upon the government to justify the different treatment. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976); *see also* 10 U.S.C. § 836(a).

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[5] Article 2(a)(10), 10 U.S.C. § 802(a)(10), as amended in 2006, also subjects certain civilians to trial by court-martial. NIMJ takes no position on the constitutionality of that amendment, but notes it to make clear that the issue raised here may not be limited to cases involving uniformed personnel.

The court-martial system is unique in extending an extraordinary protection to those tried for capital crimes: presidential approval is required before a death sentence may be imposed. Article 71(a) of the UCMJ states in its entirety:

> If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

10 U.S.C. § 871(a). This "presidential approval requirement adds an additional layer of protection for an accused in the military death penalty system," and it compensates for fewer or less rigorous due process protections in other facets of the court-martial system. Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 Mil. L. Rev. 1, 24-30 (2006).

Under Article 76 of the UCMJ, a death sentence may not be imposed and is not final until after the sentence has been approved by the President. It provides that "[t]he appellate review of records of trial . . . and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter . . . are final and conclusive." 10 U.S.C. § 876. As this Court held with respect to Article of War 53, the immediate statutory predecessor of the present Article 76, finality in this article defines "the terminal point for proceedings within the court-martial system." *Gusik v. Schilder*, 340 U.S. 128, 132 (1950); *see also Loving v. United States*, 62 M.J.

235, 242-43 (C.A.A.F. 2005) ("*Loving II*") (citing *Gusik* and ruling that Petitioner's death sentence is not final until presidential approval). Indeed, pursuant to his constitutional authority as commander-in-chief of the armed forces and the broad power delegated to him by Congress to promulgate procedural rules for courts-martial, the President sits at the apex of the military justice system. *See* U.S. Const., art. II, § 2; 10 U.S.C. § 836(a).

The requirement for presidential approval is analogous to the requirement that the convening authority review and approve of sentences imposed by a general court-martial. Article 60(a) of the UCMJ provides that "[t]he findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence," so that the convening authority may decide whether to approve or disapprove of the sentence. 10 U.S.C. § 860(a). Additionally, as with presidential approval of death sentences, Article 60(d) provides that "the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer." 10 U.S.C. § 860(d). The purpose of this recommendation "is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative." Rule for Courts-Martial ("R.C.M.") 1106(d)(1).

When the executive branch promulgated the Rules for Courts-Martial to implement the UCMJ, it explicitly provided that the staff judge advocate or legal officer must serve the record of the legal proceedings, together with sentencing

recommendations, on the defendant and defense counsel before those materials are transmitted to the convening authority pursuant to Article 60. *See* R.C.M. 1106(d)(6). Further, these rules provide that defense counsel may "submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter." R.C.M. 1106(f)(4). The defendant and defense counsel also must be served with any additional material submitted to the convening authority and given an opportunity "to submit comments." R.C.M. 1106(f)(5). Military courts have held that service of these sentencing recommendations on the defendant and defense counsel "is a critical part of the accused's post-trial representation," *United States v. Mark*, 47 M.J. 99, 101 (C.A.A.F. 1997), and that failure to effect service is tantamount to absence of counsel at that "important stage" of the judicial process. *United States v. Moseley*, 35 M.J. 481, 484-85 (C.M.A. 1992). Indeed, "absent some waiver by the defense, a staff judge advocate has an obligation to provide correct information to the convening authority, for there can be no justice, no due process of law, where a convening authority is substantially misled as to fact or law." *United States v. Dowell*, 15 M.J. 351, 353 (C.M.A. 1983).

In contrast to the regulations that govern sentencing recommendations transmitted to the convening authority, however, the Rules for Courts-Martial do not expressly require service on the defendant or defense counsel of sentencing recommendations transmitted to the President. *See* R.C.M. 1204(c)(2)) (setting forth the procedure that must be followed with respect to presidential

approval). In light of the President's essential role in the sentencing process, however, some minimum due process applies to the President's decision-making process. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (where government creates judicial procedure to protect rights, that procedure must satisfy the Due Process Clause even if procedure itself is not constitutionally required). A grant of certiorari in this case would not require this Court to determine the full extent of the due process protections that attach to the presidential approval process, but this Court should take this opportunity to rule that due process requires that a service member not be put to death based on secret, undisclosed information about that service member in presidential sentencing recommendations. *See Gardner*, 430 U.S. at 361.

3) The President's power and duty to approve of a military death sentence is judicial in nature.

The purpose of the presidential approval requirement codified in Article 71(a) is to guarantee that a death sentence will not be imposed until after the President makes a personal judgment that a service member should be put to death. This requirement historically is derived from British law and the Articles of War, which were adopted in the early days of the Republic. Indeed, in affirming Petitioner's death sentence on direct appeal in his criminal case, this Court explained that, in Britain, "it was the Crown that . . . tempered the excesses of courts-martial wielding the power of capital punishment. It did so by stipulating in the Articles of War (which remained a matter of royal prerogative) that all capital sentences be sent to it for revisions or approval." *Loving v. United States*,

517 U.S. 748, 764 (1996) ("*Loving I*") (citing Charles M. Clode, *The Administration of Justice Under Military & Martial Law* 9-10 (London, John Murray 1872)). The original intent of the presidential approval requirement was one of mercy, as military tribunals were prone to severity. Clode, *supra*, at 145.

The Second Continental Congress passed a series of acts between June 30, 1775 and June 18, 1777 that provided certain high-ranking officials with the power to "pardon" or "mitigate" death sentences and certain other punishments ordered by a court-martial. Joshua M. Toman, *Time to Kill: Euthanizing the Requirement for Presidential Approval of Military Death Sentences to Restore Finality of Legal Review*, 195 Mil. L. Rev. 1, 79-80 (2008). This power to pardon served as a check of mercy on the excesses of the court-martial system. *See* Clode, *supra*, at 145 (discussing British military law and stating that the stay of an execution was "only intended to give His Majesty an opportunity of extending His Royal Mercy by Pardon or Reprieve") (internal citation omitted).

Importantly though, in 1786, the Second Continental Congress abandoned the use of the words "pardon" and "mitigate" in favor of "confirmation" and "disapproval" to describe the power and duty of certain high-ranking officials to review court-martial decisions before a sentence of death could be executed. *See* Toman, *supra*, at 80. From 1786 to 1796, this power and duty to confirm or disapprove was entrusted to Congress. *See id.* In 1796, however, Congress modified military law to provide that no court-martial death sentence in time of peace could be executed until after a record of the

proceedings were "laid before the *President of the United States* for his confirmation or disapproval, and orders in the case . . . ." *Id.* at 80-81 (emphasis added). Today, under Article 71(a) of the UCMJ and R.C.M. 1204 and 1207, a record of the legal proceedings and sentencing recommendations must be transmitted to the President to assist in his decision whether to approve of a death sentence by court-martial. R.C.M. 1204(c)(2).

The distinction between the pardon power, which is wholly discretionary, and the presidential approval requirement, which involves the exercise of a quasi-judicial judgment, is important. In 1892, the Secretary of War disseminated an opinion from the Department of Justice that concluded that the approving and pardoning powers are separate and that granting one to an authority does not necessarily grant the other. Headquarters of the Army, Adjutant General's Office, General Orders, No. 27 2-3 (April 6, 1892), *in General Orders & Circulars, Adjutant General's Office, 1892* (Washington, Gov't Printing Off. 1893). The Department explained that "the confirming or approving of the sentence of the court-martial became a revision of the proceedings like that of an appellate court. The pardoning and mitigating power remained to be exercised on different grounds, resting wholly in the arbitrary discretion of the pardoning power." *Id.* at 2.

A trio of nineteenth-century cases holds that if the President's approval of a court-martial imposed sentence is required, then the President's decision is a judicial one. *See United States v. Fletcher*, 148 U.S. 84, 89-91 (1893); *United States v. Page*, 137 U.S. 673, 678-81 (1891); *Runkle v. United States*, 122 U.S. 543,

557-59 (1887). Article of War 65, a precursor to Article 71(a), required that "the sentence of a general court-martial in time of peace, to the effect that a commissioned officer be cashiered, – dismissed from service, – is inoperative until approved by the president." *Runkle*, 122 U.S. at 555. The Court in *Runkle* held that "the action required of the president is *judicial in its character*, not administrative. As commander in chief of the army, . . . [h]is personal judgment is required, as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself." *Id.* at 557 (emphasis added). In *Fletcher*, this Court explained that the President's order whether to approve a court-martial sentence is "capable of division into two separate parts, – one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised." *Fletcher*, 148 U.S. at 90-91 (discussing *Runkle*). Later, the Supreme Court noted that these three cases "held, obviously enough, that the [language of Article of War 65] called for personal review and action by the President and that *making him*, as it did, in effect, a *member of the court*, the required review was *judicial in character* and therefore nondelegable." *United States ex rel. French v. Weeks*, 259 U.S. 326, 334 (1922) (emphasis added).

Despite this history, some military court decisions have suggested in *dicta* that the presidential approval requirement is simply a matter of clemency. *E.g.*, *Loving II*, 62 M.J. at 247 (stating that presidential review is "conducted as a matter of clemency"); *United States v. Woods*, 21 M.J. 856, 872-73 (A.C.M.R. 1986), *overruled on other grounds*, 26 M.J. 372 (C.M.A. 1988). Such *dicta* conflict with the

cases that correctly recognize that the President can exercise judicial functions in the military justice system. *See Schick v. Reed*, 483 F.2d 1266, 1270 (D.C. Cir. 1973), *aff'd*, 419 U.S. 256 (1974) ("[T]he sentence imposed by the court-martial was not effective until approved by the President, whose action was by statute made a *part of the sentencing process*.") (emphasis added). The Court should take this opportunity to reaffirm its settled precedent that the presidential approval requirement in Article 71(a) is not merely a matter of clemency but also involves action of a judicial character and that, as such, the approval process is subject to the demands of due process. At a minimum, due process in the administration of military justice requires disclosure to the affected individual of the sentencing recommendations upon which a presidential decision on the death sentence is based. In addition, as explained in Point II below, the judicial character of the presidential approval process undermines the rationale for applying the government's claims of executive privilege here.

## II. REVIEW IS NEEDED TO CLARIFY THAT EXECUTIVE PRIVILEGES DO NOT APPLY TO JUDICIAL DECISIONS TO IMPOSE A DEATH SENTENCE.

In the area of executive privileges, the Court's jurisprudence has focused on the existence and the scope of the presidential communications privilege where the executive branch claims that confidentiality is needed to perform "executive" duties that involve making policy decisions and judgments. It is in this context that the Court has held that the presidential communications privilege is necessary to guarantee the candor of presidential

advisors and to provide "[a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in way many would be unwilling to express except privately." *United States v. Nixon,* 418 U.S. 683, 708 (1974); *see also Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 383-84 (2004) (in considering privilege's applicability to materials of the National Energy Policy Development Group, the Court held that "[e]xecutive privilege is an extraordinary assertion of power not to be lightly invoked").

The Court of Appeals' decision, which concluded that the presidential communications and deliberative-process privileges bar disclosure of Petitioner's sentencing recommendations, placed those recommendations squarely within the traditional bounds of the wholly discretionary prerogative of the executive branch and outside the judicial process. *See Loving III*, 550 F.3d at 39-41. This is especially evident from the court's reliance on its FOIA opinion in *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004)). In that case, a third party requester sought agency documents that would shed light on the President's exercise of his pardon power under Article II. *Id.* at 1109-11. Noting that the pardon power is a "quintessential and non-delegable Presidential duty," *id.* at 1119, involving "discretion" and "autonomy," *id.* at 1117, the court of appeals ruled that "the presidential communications privilege applies to *pardon documents* 'solicited and received' by the President . . ., and that the deliberative process privilege applies to internal agency documents," *id.* at 1123 (emphasis added).

But this case is not about the pardon power. Nor is it about the deliberative process that the Executive employs when making policy decisions and judgments. Rather, it is about whether the presidential communications and deliberative-process privileges apply to sentencing recommendations transmitted to the President in a judicial process set forth in the UCMJ to sentence a service member to death. The Court has never considered whether and how executive privileges apply to adjudicatory decisions made by the executive branch concerning the sentencing of individual defendants in the military criminal justice system.

In *Nixon*, 418 U.S. at 713, the Court recognized that executive privileges "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." Indeed, "the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.* at 709. Accordingly, in the civilian criminal justice system, the factual sections of a presentence report must be disclosed to the defendant and defense counsel, subject to certain enumerated exceptions. Fed. R. Crim. Proc. 32(c). The defense is also given a right to comment on the report. *Id.*

This same right is required by due process in the military criminal justice system. Lower courts already have acknowledged that executive privileges may not protect communications relating to adjudicatory decisions from disclosure. The District of Columbia Circuit observed that "there may be instances where the docketing of conversations between the President or his staff and other

Executive Branch officers may be necessary to ensure due process." *Sierra Club v. Costle*, 657 F.2d 298, 406-07 (D.C. Cir. 1981) (reasoning that "where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings[,] there is no inherent executive power to control the rights of individuals in such settings."); *see also In re Sealed Case*, 121 F.3d 729, 746 n.17 (D.C. Cir. 1997) (explaining that "the White House's *ex parte* contacts with outside agencies may be subject to disclosure by statute"). The Court should grant certiorari to consider and clarify the applicability of executive privileges in the administration of military justice where the President is required to make an adjudicatory decision about whether to approve of a death sentence.

## CONCLUSION

Service members on death row have a right to know the information that is provided to the President when that official is called upon to approve the death sentence. Because of the importance of this right and the recurring nature of the issue, the Court should grant certiorari to consider whether, in the context of the administration of military justice in a capital case, the presidential communications and deliberative-process privileges are sufficient bases for denying access to sentencing recommendations made to the President.

Respectfully submitted.

DANIEL S. FLOYD
*Counsel of Record*
BENJAMIN BRODERICK
SCOTT M. MALZAHN
MICHAEL M. LEE
ALEXANDER M. MIRCHEFF
ELIZABETH RICHARDSON-ROYER
PAUL FRICKE
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071-3197
(213) 229-7000

*Counsel for Amicus Curiae*

July 1, 2009